

RAS 12217

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Oral Arguments ITMO David Geisen

DOCKETED  
USNRC

Docket Number: IA-05-052

September 11, 2006 (10:05am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Location: Rockville, Maryland

Date: Wednesday, September 6, 2006

Work Order No.: NRC-1241

Pages 176-284

NEAL R. GROSS AND CO., INC.  
Court Reporters and Transcribers  
1323 Rhode Island Avenue, N.W.  
Washington, D.C. 20005  
(202) 234-4433

TEMPLATE = SECY - 032

SECY - 02

1 UNITED STATES OF AMERICA

2 + + + + +

3 NUCLEAR REGULATORY COMMISSION

4 ORAL ARGUMENTS

5 -----x

6 In the Matter of: :

7 DAVID GEISEN : Docket No. IA-05-052

8 (Enforcement Action) :

9 -----x

10  
11 Wednesday,

12 September 6, 2006

13  
14 ASLBP Hearing Room

15 Two White Flint North

16 11545 Rockville Pike

17 Rockville, Maryland

18  
19 The above-entitled matter came on for oral  
20 argument, pursuant to notice, at 10:00 a.m.

21 BEFORE:

22 MICHAEL C. FARRAR, Administrative Judge

23 E. ROY HAWKENS, Administrative Judge

24 NICHOLAS G. TRIKOUROS, Administrative Judge

25  
**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1        APPEARANCES:

2                On Behalf of David Geisen:

3                        RICHARD A. HIBEY, ESQ.

4                of:    Miller & Chevalier, Chartered

5                        655 15th Street, N.W.

6                        Suite 900

7                        Washington, D.C. 20005-5701

8                        (202) 626-5888

9  
10                        ANDREW T. WISE, ESQ.

11                of:    Miller & Chevalier, Chartered

12                        655 15th Street, N.W.

13                        Suite 900

14                        Washington, D.C. 20005-5701

15                        (202) 626-5818

16  
17                        MATTHEW T. REINHARD, ESQ.

18                of:    Miller & Chevalier, Chartered

19                        655 15th Street, N.W.

20                        Suite 900

21                        Washington, D.C. 20005-5701

22                        (202) 626-5894

23  
24  
25  
  
**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

On Behalf of the Nuclear Regulatory Commission:

MARY C. BATY, ESQ.

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop - 0-15 D21

Washington, D.C. 20555-0001

(301) 415-1324

FAX (301) 415-3725

SARA E. BROCK, ESQ.

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop - 0-15 D21

Washington, D.C. 20555-0001

(301) 415-8393

FAX (301) 415-3725

BRADLEY JONES, ESQ.

U.S. Nuclear Regulatory Commission

Assistant General Counsel

Office of the General Counsel

Mail Stop - 0-15 D21

Washington, D.C. 20555-0001

(301) 415-1681

FAX (301) 415-3725

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 ALSO PRESENT:

2 WILLIAM BORDEN, Office of Investigations, NRC

3 MARGARET PARISH, Law Clerk, ASLBP, NRC

4 KAREN VALLOCH, Administrative staff, ASLBP, NRC

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealgross.com](http://www.nealgross.com)

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

(10:01 a.m.)

1  
2  
3 JUDGE FARRAR: Good morning. We're here  
4 to hear oral argument in an enforcement case involving  
5 David Geisen growing out of the Davis-Besse incident  
6 of a few years ago.

7 We have a motion in front of us by Mr.  
8 Geisen to compel production of an unredacted version  
9 of an Office of Investigations report. Mr. Geisen has  
10 a heavily redacted version. He wants to see the whole  
11 thing.

12 By way of introduction, I'm Mike Farrar,  
13 the Chairman of this Board. With me on my right, my  
14 brother Judge, Roy Hawkens, who is like me legally  
15 trained, and on my left Nicholas Trikouros, who is a  
16 technical Judge. Behind the pole is Meg Parish, our  
17 brand-new law clerk.

18 For Mr. Geisen?

19 MR. HIBEY: For Mr. Geisen, Richard Hibey.  
20 Good morning, Your Honor.

21 JUDGE FARRAR: Good morning.

22 MR. WISE: Good morning, Your Honor.  
23 Andrew Wise.

24 MR. REINHARD: Good morning, Your Honor.  
25 Matthew Reinhard.

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 JUDGE FARRAR: Okay. For the Staff?

2 MS. BATY: Your Honor, I am Mary Baty, and  
3 my co-counsel, Sara Brock. And we also have with us,  
4 accompanied by Bill -- Senior Special Agent Bill  
5 Borden from the Office of Investigations, Assistant  
6 General Counsel Brand Jones, and then we have Mr. Jim  
7 Luehman from the Office of Enforcement, Deputy  
8 Director of the Office of Enforcement, in the  
9 audience.

10 JUDGE FARRAR: All right. Thank you.  
11 Glad to have you all here with us.

12 Let's plan on about 40 minutes a side. We  
13 will allow more time if need be, but we should be able  
14 to finish in well under two hours.

15 Before we start, let me explain to those  
16 who are watching here and via the broadband three  
17 points about this case. One, this is an oral  
18 argument. It's different from an evidentiary hearing  
19 where you have witnesses here. We have already read  
20 the parties' briefs, and we asked to hear oral  
21 argument so as to explore their positions a little  
22 more.

23 You shouldn't try to discern where we're  
24 coming from by the nature of our questions. But if  
25 you do think we are leaning one way or the other, we

1 do have the briefs, we would be entitled to write a  
2 decision without oral argument, so there's nothing  
3 wrong with that.

4 Second, this motion concerns whether Mr.  
5 Geisen gets the unredacted version of the document.  
6 It has nothing to do with whether he is guilty or  
7 innocent of the charges that the staff brought against  
8 him.

9 And, third, the staff has the full  
10 document. Under a procedure arranged with the  
11 parties, the Board has the full document. But in what  
12 would be unusual in most cases Mr. Hibey, counsel for  
13 Mr. Geisen, does not have the full document. So we'll  
14 have to work around that as we hold oral argument.

15 Mr. Hibey, it's your motion. Before you  
16 start, the Board has a factual clarifying question to  
17 ask the staff. On page 14 of your brief, the last  
18 sentence in the back of the brief, you say that "All  
19 of the facts contained in the OI report come from the  
20 274 exhibits attached to the report disclosed by the  
21 Staff. Mr. Geisen has received every piece of factual  
22 information in the Staff's possession."

23 We want to make sure we understand that.  
24 Those 274 exhibits have been given to Mr. Hibey in  
25 unredacted form?

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 MS. BATY: No, Your Honor. There have  
2 been minimal personal privacy redactions, Social  
3 Security Numbers, home addresses, home telephone  
4 numbers from the -- from the transcripts.

5 JUDGE FARRAR: The standard personal  
6 privacy --

7 MS. BATY: The standard personal privacy  
8 redactions from the transcripts. And I --

9 JUDGE FARRAR: But nothing substantive.

10 MS. BATY: I'm not aware of anything.

11 JUDGE FARRAR: Mr. Hibey, does that square  
12 with what you think you have?

13 MR. HIBEY: That comports with our  
14 recollection, Your Honor.

15 JUDGE FARRAR: Okay, fine. A followup  
16 question. Given the answer, Ms. Baty, you just gave  
17 us where we look at the unredacted portions, and it  
18 says it's the testimony of Mr. X, based on what you  
19 just said that testimony of Mr. X is, in fact, some  
20 agent's summary of what Mr. X said, which is contained  
21 in one of the exhibits, namely the transcript of the  
22 interview of Mr. X?

23 MS. BATY: That's correct.

24 JUDGE FARRAR: Okay. So, all right.  
25 Fine.

1 Mr. Hibey, it's your motion. Given the  
2 peculiar procedural circumstances of the case, we  
3 might recommend to you that you save more than the  
4 usual amount of time for rebuttal, because some of the  
5 things you have to address you won't know until the  
6 Staff answers some of our questions.

7 MR. HIBEY: And I think that's precisely  
8 the situation in which I found myself in the  
9 preparation for this argument. Good morning, Your  
10 Honors.

11 JUDGE FARRAR: Good morning.

12 MR. HIBEY: And so I think I will conserve  
13 my time. I would like, however, to make a few  
14 statements that perhaps might influence the manner in  
15 which this Tribunal approaches, ultimately, its  
16 decision on the question of these redactions.

17 May I propose that a standard by which to  
18 judge in camera whether this report is predecisional  
19 is to look at the purpose of the investigation. That  
20 is set forth at the beginning of the OI report, and it  
21 says in essence, "Did personnel at Davis-Besse  
22 wilfully and deliberately violate NRC requirements?"

23 That deliberate misconduct is concluded to  
24 have taken place by these report writers. This  
25 imports a guilty knowledge and an intent to deceive

1 the NRC.

2 The OI report, insofar as Mr. Geisen is  
3 concerned, does not point to any documents or  
4 testimony that makes out the elements of intent  
5 without credibility judgments of the writers being  
6 made part of that conclusion. Those elements exist,  
7 therefore, we contend, not in any one document or in  
8 any accumulation of documents that make up the  
9 exhibits, but rather in the credibility judgments that  
10 are made by the report writers at the time they write  
11 this document, a document which is their statement, a  
12 document of theirs which is their statement.

13 And, therefore, they -- the writers -- who  
14 are likely to be witnesses in this case, are -- have  
15 issued a statement, and that's what we're talking  
16 about here.

17 JUDGE FARRAR: Let me ask you a question.  
18 Suppose those writers got it all wrong.

19 MR. HIBEY: That's right.

20 JUDGE FARRAR: Suppose they got it all  
21 wrong. You said they will be witnesses here. Help us  
22 on that, because my expectation of the case, before  
23 you said that in your brief and just now, was that  
24 they would not be witnesses here, that even though we  
25 have relaxed hearsay rules in administrative

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 proceedings, in a case like this which deals with more  
2 intense personal rights and a very severe sanction,  
3 that you wouldn't have the witnesses saying, "Here's  
4 what we heard from Mr. Smith," you wouldn't have the  
5 investigator saying, "Here's what we heard from Mr.  
6 Smith."

7 You would have Mr. Smith and Mr. Jones and  
8 everybody else on the stand telling us what they  
9 thought. So why aren't the conclusions of these  
10 investigators, while highly relevant for purposes of  
11 the Staff deciding whether to issue the enforcement  
12 order, not relevant for our purposes?

13 MR. HIBEY: Well, I suppose, Your Honor,  
14 we would recognize that the relevance of their  
15 statements might be diminished in a circumstance where  
16 we're certain they are not going to testify. I had no  
17 such certainty coming into this proceeding. The only  
18 guidance I have in that regard is my clear knowledge  
19 and understanding of the manner in which these people  
20 were used in the criminal case. They were used -- one  
21 of them certainly appeared before the Grand Jury nine  
22 times.

23 It's my expectation that there would be an  
24 attempt to use the testimony -- to use that person as  
25 a witness going forward. In addition --

1 JUDGE FARRAR: Well, isn't it different  
2 going to a Grand -- I mean, Grand Jury will hear --

3 MR. HIBEY: Hearsay.

4 JUDGE FARRAR: -- anything from anybody,  
5 and that's consistent with their function.

6 MR. HIBEY: I believe --

7 JUDGE FARRAR: Our function is to find --  
8 and they say, "Is there enough here to move forward  
9 with the case?" Our decision -- we have to decide, is  
10 there enough here to uphold the five-year debarment  
11 from the industry? which is an entirely different  
12 question.

13 I know these investigators may have taken  
14 pictures. They may have seized documents, and  
15 certainly they could be witnesses to bring those  
16 materials in. But wouldn't -- if the Staff put on one  
17 of these people and said, "Okay. Tell us what you  
18 found by talking to the 20 Davis-Besse employees you  
19 interviewed," wouldn't you be the first one jumping up  
20 saying -- you're saying --

21 MR. HIBEY: Yes, I would. Yes, I would.  
22 Absolutely. But also, if a witness is called forth to  
23 impeach a witness that has been called, and it's one  
24 of these -- one of these investigators, then his  
25 statements will be subject to cross examination, and

1 their credibility must be weighed by the Panel.

2 And that is why I view this report more as  
3 a statement of the witnesses than I do as a report so  
4 to speak, if you can appreciate that distinction,  
5 which as I say it sounds more metaphysical than I want  
6 it to.

7 JUDGE FARRAR: So you're saying it is --  
8 the question I asked Ms. Baty at the beginning that  
9 was patterned through this -- through the redactions  
10 is there's three or four paragraphs by the  
11 investigator summarizing the statement of a witness.  
12 You have that witness' full statement, but you're  
13 saying that you need to have the agent's summary  
14 because of the role the agent might play later.

15 MR. HIBEY: Yes. Yes. If this agent is  
16 going to be a witness, then this statement of his is  
17 something we need to see in its entirety. And the  
18 nature of the document, as construed as a -- as a  
19 document in aid of decision by the Commission, or the  
20 Staff and later the Commission, is secondary to the  
21 nature of the document as a statement of the witness.  
22 Its credibility when that person is a witness can be  
23 tested by whatever it is he said in that statement,  
24 which makes up his statement.

25 Yes, sir.

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 JUDGE TRIKOUROS: Mr. Hibey, what if the  
2 statement did not involve Mr. Geisen in any way but  
3 involved an allegation that was never substantiated or  
4 a -- it was regarding an individual who in the end was  
5 not charged with anything.

6 MR. HIBEY: Well, Your Honor, in that  
7 circumstance, then, it is likely that the statement  
8 would not be used or advanced as an item of evidence  
9 in court. But the point is that's a judgment that can  
10 really only be made if we have the benefit of  
11 reviewing the document. And then, of course, any  
12 effort to use it as an impeaching document would be  
13 subject to rulings by the court after objections are  
14 made, if any are in fact made.

15 But on the other hand, there is evidence  
16 in this case of credibility judgments that I can think  
17 of in two instances that already I think are known  
18 that point up the need for this. In the first  
19 instance there is a person by the name of Goyal. He  
20 was interviewed by these agents. Then, they write a  
21 report. They charge him with the same offenses.

22 He denies the charges. He demands a  
23 hearing. Then, he withdraws his demand for a hearing  
24 and accepts debarment. Now he will be a witness in  
25 this hearing. The question of what they said

1 concerning their interaction with Goyal is important,  
2 especially if it's not captured in an interview with  
3 Goyal.

4 Secondly, there is a man named Siemaszko  
5 similarly charged. On the record they find him to be  
6 deceptive with them in the first interview that they  
7 had with him. Then, they interview him and again tell  
8 him on the record that they now believe him and that  
9 their first encounter with him he was deceptive.

10 Now, how do they explain their turnaround,  
11 and to what extent did their belief in the testimony  
12 of Mr. Siemaszko play in their conclusions about Mr.  
13 Geisen?

14 JUDGE FARRAR: Then, you don't agree with  
15 the Staff that all that's at issue here is whether Mr.  
16 Geisen is guilty? What you just said indicates that  
17 you think his relationship with all of these other  
18 people bear -- and what they did bears on his guilt or  
19 innocence.

20 MR. HIBEY: Oh, absolutely, Your Honor.  
21 There is no question. The notion that you're being  
22 asked to decide only the question of the guilt or non-  
23 guilt of Mr. Geisen is a useless formulation in my  
24 view, because theories of direct involvement or aiding  
25 and abetting are necessarily going to be considered by

1 you.

2 And the question of Mr. Geisen's guilt or  
3 innocence truly focuses on only him, but it does not  
4 speak to the focus of the evidence. The evidence is  
5 going to be far broader than that in its scope and  
6 rendition, because it is impossible to tell the story  
7 of what transpired at Davis-Besse over a period of  
8 several years without our understanding of the  
9 involvement of a number of individuals, two of whom  
10 are Goyal and Siemaszko.

11 JUDGE HAWKENS: But the extent of that  
12 involvement is detailed in the exhibits, and you've  
13 received all of them.

14 MR. HIBEY: Their involvement is evidenced  
15 in part by the exhibits that we have received. It  
16 does not by any means tell the entire story. That's  
17 why you're going to have witnesses rather than simply  
18 handed up a couple of hundred exhibits.

19 JUDGE HAWKENS: And I'll have to ask the  
20 Staff this.

21 MR. HIBEY: Of course.

22 JUDGE HAWKENS: It's my understanding that  
23 the story in the OI report is -- comes directly from  
24 the exhibits.

25 MR. HIBEY: Well --

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 JUDGE HAWKENS: There may be more that  
2 we'll hear in evidentiary hearing.

3 MR. HIBEY: That's right.

4 JUDGE HAWKENS: What's important here is  
5 you want what's expunged from the OI report, and all  
6 of that is readily available to you in the exhibits.

7 MR. HIBEY: Yes. I mean, I think that is  
8 a proposition that we would -- we would seriously  
9 question. I did make a statement, and I'll stand by  
10 it, but may I repeat it? And it is this: the  
11 documents do not tell the entire story. They simply  
12 don't. They ramped up the allegations here beyond the  
13 failure to provide complete and accurate information  
14 to a deliberate, wilful, and, therefore, knowing and  
15 intentionally deceptive act on the part of Mr. Geisen  
16 with respect to the statements that he made.

17 That loads up with the essential elements  
18 of knowledge and intent that we contend don't exist in  
19 a simple reading of the documents. And that our take  
20 on this entire report is informed by what we're not  
21 seeing.

22 Take for example the articulation of the  
23 purpose of the investigation. I paraphrased I think  
24 the -- but nearly quoted the articulation of the  
25 purpose of the investigation. Did --

1 JUDGE HAWKENS: Take me to the page you're  
2 looking at, please.

3 MR. HIBEY: I can do that.

4 (Pause.)

5 29. This investigation was initiated by  
6 the NRC Office of Investigations Region III to  
7 determine whether First Energy Nuclear Operating  
8 Company personnel stationed at the Davis-Besse nuclear  
9 plant wilfully violated NRC requirements regarding the  
10 reactor vessel head.

11 It is not a question -- the purpose of the  
12 investigation is not, how did the degraded head escape  
13 the awareness of FENOC personnel and the Region III  
14 inspectors?

15 JUDGE FARRAR: But I asked --

16 MR. HIBEY: In our view -- I'm sorry.

17 JUDGE FARRAR: No, go ahead.

18 MR. HIBEY: In our view, the very  
19 articulation of the purpose of this investigation  
20 imports a predisposition on the part of the report  
21 writers that there was extreme wrongdoing, and it  
22 could only have been perpetrated by Davis-Besse  
23 personnel.

24 JUDGE FARRAR: Suppose you're right about  
25 that, and suppose that -- and for those watching, we

1 ask a lot of hypothetical questions. Suppose that the  
2 investigation got off totally on the wrong track, for  
3 the wrong purpose, and was wrong headed all the way  
4 through.

5 That's why you've got us that led --  
6 that's like a Grand Jury. They, in effect, indicted  
7 your fellow, but that's why you get a hearing in front  
8 of us. And if all of those things are true about how  
9 that investigation was wrong headed, why isn't your  
10 remedy to put on evidence in front of us that shows  
11 Mr. Geisen was one of the good guys?

12 MR. HIBEY: That's exactly what we intend  
13 to do. But in the process, we have to take on a  
14 formulation of the evidence which we think needs to be  
15 tested in every material respect through cross  
16 examination and the -- of every witness.

17 JUDGE FARRAR: But you know who they are.  
18 You can have discovery for as long -- we've said  
19 several times you're entitled to an expeditious  
20 hearing, but you're the one entitled to it. And if  
21 you need more time for discovery, you're going to get  
22 it, so why can't you depose all these people, ask them  
23 anything you want, and come armed to the teeth to the  
24 hearing in front of us saying the -- in effect proving  
25 that the Staff investigation was off on the wrong

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 track from the beginning, and, in fact, your guy is  
2 not guilty.

3 MR. HIBEY: That's exactly what we intend  
4 to do.

5 JUDGE FARRAR: Okay.

6 MR. HIBEY: And in aid of that, we need  
7 what's in this report in order to effectively be able  
8 to do that.

9 JUDGE FARRAR: Well, let us talk to the  
10 Staff about some of that. Let me ask you -- and I do  
11 want you to save some time for rebuttal -- you had  
12 some -- in your brief some concern over the procedure  
13 the Staff used to invoke these privileges, that it  
14 fell short in terms of the privilege logs, and so  
15 forth and so on. But here we are today. Can we move  
16 past that and get to the merits of the privileges  
17 which are now in front of us? Or is there some  
18 prejudice to you from the manner in which they  
19 exercised their privilege claims?

20 MR. HIBEY: Well, I think that the -- if  
21 there is -- if this Panel discerns that the manner in  
22 which the privilege was invoked with respect to Mr.  
23 Geisen's case does not comport with the procedures  
24 that the Nuclear Regulatory Commission requires, then  
25 that error of invocation I think simply is evidence,

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 accumulates toward the proposition that the vague and  
2 imprecise invocation of the privilege should not be  
3 given any weight in this proceeding.

4 On the other hand, if it is determined  
5 that they did in fact comply, then obviously we have  
6 to move on to other issues in support of our motion to  
7 compel the production of the report.

8 JUDGE TRIKOUROS: Mr. Hibey?

9 MR. HIBEY: Yes, Your Honor.

10 JUDGE TRIKOUROS: One step back from  
11 possible invocation error, were you aware of which  
12 redactions were deliberative process and which  
13 redactions were personal privacy specifically for Mr.  
14 Geisen's case?

15 MR. HIBEY: I did not understand what that  
16 was. Now, some effort has been made and charts to  
17 kind of break out what we discerned to be deliberative  
18 process on the one hand and personal privacy on the  
19 other. But beyond that, there has been none of the  
20 usual specificity accompanying the logging of the  
21 assertion. So I'm generally in the dark about that.

22 JUDGE TRIKOUROS: Because in your  
23 documentation, one of your letters, you specifically  
24 reference a table from another case which breaks down  
25 the redactions in terms of those two things. But it's

1 another case, it's not Mr. Geisen's.

2 MR. HIBEY: That's right, yes. And that's  
3 the difficulty. What I wanted to check -- and perhaps  
4 I can put the issue before the Panel and our opponents  
5 could respond to it -- there is -- in Mr. Caputo's  
6 affidavit, he said that on the 26th of May he told the  
7 Staff that he wanted to invoke the privilege -- the  
8 privileges -- the deliberative process and personal  
9 privacy privilege -- in connection with Mr. Geisen's  
10 matter

11 And I have not seen any documentation to  
12 that effect, so I don't know what happened. And the  
13 one thing I wanted to check on was the significance of  
14 May 26th. It may very well have coincided with the --  
15 near the time when we received the redacted report.  
16 I just don't remember that standing here today, and it  
17 occurred to me only this morning away from my office.

18 But I have no other evidence to know what  
19 particularized attention Mr. Caputo gave, or whether  
20 this was simply a way of the staff assuring that there  
21 is some record of the privilege having been invoked as  
22 to Mr. Geisen's case as opposed to the others.

23 I'll stand down for now, Your Honor.

24 JUDGE TRIKOUROS: All right.

25 MR. HIBEY: Please, Your Honor.

1 JUDGE HAWKENS: Deliberative process  
2 privilege. Let's assume here that the two elements  
3 are satisfied, and let's further assume that we have  
4 looked at the exhibits and have determined that the  
5 substance of the portion of the OI report covered by  
6 that privilege consists only of material from the  
7 exhibit, which you have. How would you demonstrate in  
8 that circumstance a need for the material covered by  
9 deliberative process?

10 MR. HIBEY: Thank you, Your Honor. Well,  
11 since what is at stake here -- and not in any of the  
12 cited cases -- is Mr. Geisen's continued loss of  
13 profession and livelihood in it by reason of charges  
14 that contain all of the elements of criminal conduct.

15 We would take the position that his --  
16 that in weighing the balance between the interest of  
17 maintaining confidentiality of what would be construed  
18 to be deliberative process communications with the  
19 needs that he has as a matter of due process, of  
20 fairness under the circumstances, that that would tip  
21 the balance in his -- in his favor for the disclosure  
22 of these otherwise privileged materials, if I accept  
23 your question on its terms.

24 So what we are saying here is that the  
25 stakes here are not of the sort that you encounter in

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 FOIA, for example. In FOIA, you have -- you have  
2 parties come before the NRC seeking information in a  
3 non-litigation context, in a situation where an  
4 individual has not been charged with a violation of  
5 some integrity offense, where people are looking for  
6 records and rates and questions involving the  
7 effectiveness of certain kinds of technology, and the  
8 placement of sites and things like that, which really  
9 is the stuff of which the Commission involves itself  
10 far more frequently than a situation involving an  
11 individual who has been charged with a crime against  
12 integrity.

13 JUDGE HAWKENS: I can well understand  
14 there is a difference between this employee, and there  
15 is a due process interest here. But the elements of  
16 due process are notice and the opportunity to be  
17 heard. If you have notice because you have every fact  
18 embodied within the exhibits available to you, why do  
19 you need to know the OI, the personal thought  
20 processes of an investigator, when that's not -- he is  
21 not even the final decisionmaker?

22 MR. HIBEY: Because the involvement of the  
23 investigator provided the glue that gives an  
24 interpretation to these documents that has caused this  
25 whole matter to move forward. That glue needs to be

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 dissolved.

2 JUDGE FARRAR: But what do you do with the  
3 DDT case where the internal memos to the Administrator  
4 summarizing -- the Administrator of the Environmental  
5 Protection Agency summarizing the year-long  
6 evidentiary hearing were held by the D.C. Circuit to  
7 be deliberative process and entitled to protection  
8 even if they were dead wrong?

9 MR. HIBEY: Well, I think that in that  
10 circumstance we were not dealing with the counter to  
11 all of that. Remember, we're trying to balance things  
12 here. Here, I mean, no one was accused ultimately, as  
13 a result of whatever they did in DDT, of conduct that  
14 disqualified that person from being able to work in  
15 this regulated industry forevermore.

16 JUDGE FARRAR: But the manufacturer would  
17 have said that it was deprived of a multi-hundred  
18 million dollar license, didn't lose liberty or job  
19 loss, what had been a valuable license.

20 MR. HIBEY: Yes. But if I understand  
21 correctly, there was still a process that could have  
22 played out with respect to that corporate entity,  
23 whereby issues could have been ventilated. What we're  
24 saying here is that process, as it is visited upon  
25 this individual, needs to be more finely tuned to the

1 premise of due process, because of what he as an  
2 individual is -- has at stake, which is far different  
3 than just money.

4 JUDGE FARRAR: The Staff turns that around  
5 on you. They say several times in their brief  
6 correctly that there's a public interest in protecting  
7 the deliberative process, and then they say you have  
8 not shown any countervailing public interest in Mr.  
9 Geisen getting this. Do you need a countervailing  
10 public interest?

11 MR. HIBEY: I should think that the  
12 countervailing public interest is to see that this  
13 individual is provided due process in a circumstance  
14 where the law permits his livelihood to be taken away  
15 from him before he is ever given an opportunity to be  
16 heard.

17 JUDGE FARRAR: So in your mind, that  
18 private -- what we might look at as a private interest  
19 in his job is really a due process public interest.

20 MR. HIBEY: Oh, yes. I mean, the private  
21 interest in his job is to state it only with respect  
22 to the bread and butter aspects of being able to  
23 pursue his livelihood in his own personal  
24 circumstance. But the public issue is far greater,  
25 and that is to assure that our citizens are not

1 deprived of the full opportunity to be heard and to be  
2 given the opportunity to confront his accusers. That  
3 is a public interest.

4 JUDGE HAWKENS: Does your argument mean  
5 that the deliberative process privilege no longer  
6 applies in an enforcement action?

7 MR. HIBEY: Very penetrating question.  
8 And I would say that the deliberative process  
9 privilege does not apply in this enforcement action.

10 JUDGE HAWKENS: And can you explain why?

11 MR. HIBEY: Because we're talking about an  
12 individual; we're not talking about a corporation.  
13 And we're talking about the recognition that integrity  
14 of offenses, individuals are entitled to a meaningful  
15 opportunity to defend oneself when accused.

16 JUDGE HAWKENS: No less than a  
17 corporation, I would think.

18 MR. HIBEY: Well, yes and no.

19 JUDGE HAWKENS: I understand you are  
20 parsing it. But you would say it would apply, then,  
21 to all enforcement actions against individuals.

22 MR. HIBEY: Certainly.

23 JUDGE HAWKENS: And you would carve out --

24 MR. HIBEY: Yes, I would certainly -- I  
25 think corporations have perhaps different notions of

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 due process. And here in the question of  
2 corporations, corporations don't have Fifth Amendment  
3 rights for example. But individuals do, and  
4 individuals have the right to confront and to cross  
5 examine and to have the full benefit of the -- of  
6 preparation, which in this instance would include a  
7 full reading of documents that had otherwise or at one  
8 time been considered privileged.

9 JUDGE HAWKENS: Do you have any case law  
10 to support that broad proposition that deliberative  
11 process does not apply in the enforcement action  
12 against individuals?

13 MR. HIBEY: Not in civil cases. I think  
14 one of the shortcomings of everything that has been  
15 put before you by both sides is that I -- and I don't  
16 think anybody has been able to find a civil case that  
17 articulates the standard I have just advanced.

18 On the other hand, I invite you to look at  
19 Nixon v. The United States, where it is clearly  
20 recognized that the executive privilege doctrine will  
21 not be sustained in a criminal case and -- or it is  
22 likely not to be -- can be overridden in a criminal  
23 case, and even at the level of the President, and  
24 require, therefore, the production of information that  
25 is otherwise deemed to be privileged.

1           So I can only look by analogy to cases in  
2 the criminal law to support that proposition. And I  
3 think that's an important analogy to pursue, because  
4 frankly --

5           JUDGE HAWKENS: Did you cite that case,  
6 the Nixon case, in your briefs?

7           MR. HIBEY: No. The Nixon -- no. The  
8 Nixon case is cited in one of the cases that has been  
9 cited in the briefs.

10          JUDGE FARRAR: Mr. Hibey, you almost sat  
11 down 20 minutes ago.

12          MR. HIBEY: I know. And I'll sit down  
13 now, Your Honor.

14          JUDGE FARRAR: But did you have --

15          JUDGE TRIKOUROS: I have a question that  
16 is not directly related to you, but I -- to everybody,  
17 and I'd like to ask it now. Setting aside  
18 deliberative process for the moment, with respect to  
19 personal privacy redactions, I'd like to understand  
20 why the proprietary documentation that has been put in  
21 place wouldn't cover those.

22          JUDGE FARRAR: The protective order.

23          JUDGE TRIKOUROS: The protective order  
24 that was issued.

25          MR. HIBEY: If you'll allow me to sit down

1 and confer with my colleagues and pleadings, I'll be  
2 happy to respond to that.

3 JUDGE TRIKOUROS: Yes. I'm not asking for  
4 an answer now. I wanted to get --

5 MR. HIBEY: Yes.

6 JUDGE TRIKOUROS: -- the question out, so  
7 that we -- I'd like to hear the answer to that  
8 somewhere in this proceeding.

9 MR. HIBEY: Yes.

10 JUDGE TRIKOUROS: Fine. Thank you.

11 JUDGE FARRAR: Thank you, Mr. Hibey.

12 Ms. Baty?

13 MS. BATY: Good morning, Your Honors. My  
14 name is Mary Baty, and I represent the NRC Staff.

15 The NRC Staff has disclosed over 13,000  
16 documents to Mr. Geisen. In so doing, the Staff has  
17 erred on the side of disclosure, redacting only the  
18 minimum amount necessary to protect agency interests.  
19 Although the burden is on the Staff to demonstrate  
20 that the requested material is privileged, once the  
21 Staff has shown a valid privilege the burden is on Mr.  
22 Geisen to show that the privileged material is  
23 relevant, necessary to a proper decision in this  
24 proceeding, and not reasonably attainable from another  
25 source.

1           According to Commission case law, Mr.  
2 Geisen must show a compelling need or special  
3 circumstances to overcome a valid assertion of the  
4 deliberative process privilege. The agent's analysis  
5 and the unsubstantiated allegations in the OI report  
6 are privileged.

7           The FOIA exemptions are incorporated into  
8 the discovery procedures in Part 2. 2.709, which  
9 governs discovery against the Staff, explicitly  
10 recognizes the FOIA exemptions.

11           JUDGE FARRAR: Does 2.709 override all of  
12 the other discovery provisions, or should it be read  
13 in conjunction with them?

14           MS. BATY: Well, 2.336 which -- 2.336(b)  
15 which governs -- which is where the Staff makes its  
16 initial disclosures, also recognizes the assertion of  
17 privileges.

18           JUDGE FARRAR: And how about 2.705?

19           MS. BATY: 2.705 also recognizes  
20 privileges.

21           JUDGE FARRAR: Okay.

22           JUDGE TRIKOUROS: Ms. Baty? You --

23           JUDGE FARRAR: Go ahead.

24           JUDGE TRIKOUROS: I'm sorry.

25           JUDGE FARRAR: You talk about the

1 unsubstantiated allegations.

2 MS. BATY: Yes.

3 JUDGE FARRAR: You didn't claim  
4 deliberative process privilege for those, did you?

5 MS. BATY: No, sir, we did not.

6 JUDGE FARRAR: Okay. You claim personal  
7 privacy.

8 MS. BATY: Yes.

9 JUDGE FARRAR: And I for one have  
10 difficulty -- if you would argue that those were  
11 deliberative process, those were kind of where the  
12 agent summarized the testimony that he had heard, said  
13 "Here is the testimony reflected in the 100-page  
14 deposition," which Mr. Geisen has, if you had claimed  
15 deliberative process for those, it seems to me that  
16 would have fit right in within the bounds of the DDT  
17 case that you cite, that that is the agent saying out  
18 of all this evidence, here is what's important for the  
19 agency decisionmakers. But you didn't claim that.

20 MS. BATY: No, Your Honor. We claimed the  
21 personal privacy exemption of 2.3090(a)(7), or the  
22 equivalent of 7-C in FOIA, which allows the  
23 withholding of information compiled for law  
24 enforcement purposes, if disclosure could reasonably  
25 constitute an unwarranted invasion of personal

1 privacy.

2 The OI report is a law enforcement  
3 document. And exemption 7-C is written as -- is  
4 written broadly to protect the name -- the identifies  
5 of individuals identified in law enforcement  
6 documents. The OI report is a law enforcement  
7 document. Therefore, the exemption 7-C protects the  
8 identities of individuals -- identities of individuals  
9 named in that -- identified in that report.

10 JUDGE FARRAR: Okay. But why does -- you  
11 go interview Mr. Smith. The agent says, "Here is what  
12 Mr. Smith said that's important." And nowhere in the  
13 description of what Mr. Smith said is important is  
14 there any appearance that somebody thought Mr. Smith  
15 was guilty of something as opposed to just being a  
16 participant in this multi-year transaction that led to  
17 the incident.

18 Why -- you know, this is not your neighbor  
19 calling the FBI and saying they have reports about  
20 what you've been doing in your house, and the FBI  
21 says, "No, we're not going to release that because  
22 that would be unfair, that would invade your privacy."  
23 These were co-workers who were interviewed for the  
24 purpose of what went on. Why is their privacy  
25 involved?

1 MS. BATY: Your Honor, the 7-C exemption  
2 has been recognized. It was -- by the Supreme Court  
3 to broadly protect the identities of individuals named  
4 in law enforcement documents. That extends to  
5 witnesses. It extends to targets of investigation,  
6 and it also extends to the investigators, because  
7 there is a reputational harm from being associated  
8 with a law enforcement document. This OI report --

9 JUDGE FARRAR: I understand that in an  
10 ordinary context.

11 MS. BATY: And it's embarrassing, and it  
12 could damage their reputation.

13 JUDGE FARRAR: I understand that in an  
14 ordinary law enforcement context where you're trying  
15 to -- you know, people are -- have these vague  
16 accusations. This was a huge multi-year process. You  
17 may have -- you may have split it into 11 or more  
18 separate allegations, but this is one continuing  
19 transaction that a whole lot of Davis-Besse employees  
20 were involved in, and for good or for bad, and  
21 everyone knows who they are, and so I don't understand  
22 why, if they weren't charged, how their privacy rights  
23 are invaded. They worked there. They worked on this  
24 problem. I don't -- what's the big deal about their  
25 privacy?

1 MS. BATY: Your Honor, it's an  
2 embarrassment. Number one, we redacted the  
3 unsubstantiated allegations, because in the course of  
4 the OI report that individual may be identified as a  
5 target, have been -- have been subject to an  
6 allegation of wrongdoing. And then, the Staff did not  
7 substantiate that allegation, and, therefore, that  
8 person has a strong privacy interest in keeping that  
9 information private.

10 Furthermore, the 7-C redactions are really  
11 quite minimal. The Staff only redacted  
12 unsubstantiated allegations -- allegations that were  
13 not substantiated by the Staff when deciding to take  
14 individual enforcement actions and allegations that  
15 were not substantiated by the Office of Enforcement.  
16 This OI --

17 JUDGE FARRAR: But those are huge amounts  
18 of material, and most of them, when I read them, don't  
19 have anything in there about an allegation. It just  
20 says, "We talked to Mr. -- here is what Mr. Smith  
21 said." It doesn't say Mr. Smith was a target. It  
22 doesn't say he's a good guy, a bad guy. "We talked to  
23 Mr. Smith, who had this role, and here is what he said  
24 about how this problem developed." Why does that go  
25 to Mr. Smith's personal privacy, that he was

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 interviewed? Of course he was interviewed. He was --  
2 he was one of the team that worked on this issue.

3 MS. BATY: But it was incorporated into a  
4 law enforcement document, and so we redacted it. That  
5 also comes from an allegation that was not  
6 substantiated. I think the one that you're referring  
7 to is an allegation that was not even substantiated by  
8 the Office of Investigations.

9 However, you need to keep in mind, Your  
10 Honors, that Parts 1, 2, and 4 of the OI report deal  
11 with aspects -- other aspects of the head degradation  
12 event that did not involve Mr. Geisen. Mr. Geisen's  
13 order involves Davis-Besse's responses to the  
14 bulletin. That's only discussed in Part 3.

15 JUDGE FARRAR: Can you understand Davis-  
16 Besse's responses to the bulletin without  
17 understanding the 10-year history that your own  
18 document starts out with, saying, "Here's what you  
19 need to understand to understand how this happened"?

20 MS. BATY: Yes, you can. Part 3 is the  
21 most important part, because it discusses Davis-  
22 Besse's responses to the bulletin, and the Staff's  
23 redactions to that part are minimal. The Staff only  
24 removed the names of individuals against whom the  
25 Staff did not substantiate allegations of wrongdoing

1 from the conclusion sections.

2 JUDGE FARRAR: I'm not talking about the  
3 little portions where there's a conclusion or there's  
4 the agent's analysis, and you take out -- it says, "We  
5 found A, B, and C were good guys, and we found D, E,  
6 and F were not," and those are redacted. That's fine.  
7 I'm talking about the multi-paragraph or multi-page  
8 sections which for all that appears are just a summary  
9 of what Mr. X said.

10 That doesn't fit within what you've just  
11 described as just removing the names. You removed  
12 everything that the investigator said was important  
13 about what Mr. Smith said, without regard to whether  
14 he was named in an allegation.

15 MS. BATY: Your Honor, in those sections  
16 where we did that kind of redaction -- often it's  
17 necessary -- to completely protect the identity of an  
18 individual, it's necessary to take out more than the  
19 individual's name. So the Staff did that in the --  
20 with regard to the allegations that were not  
21 substantiated -- unsubstantiated allegations.

22 However, in Part 3 where the allegations  
23 were substantiated against Mr. Geisen, the Staff -- in  
24 their effort to disclose as much as possible, the  
25 Staff redacted only the names of the individuals, even

1       though in order to really give them full personal  
2       privacy protection we really should have taken out, we  
3       could have taken out, and it would have been  
4       supportable by 7-C, to take out all of the identifying  
5       information.

6                   JUDGE TRIKOUROS: But, Ms. Baty, what are  
7       you trying to protect them from?

8                   MS. BATY: We're trying to protect them  
9       from the public embarrassment and possible  
10      reputational harm that would come from being  
11      associated with this report.

12                  JUDGE TRIKOUROS: So this -- you're trying  
13      to protect them from the public. You're trying to  
14      prevent the public from seeing this documentation. Is  
15      there the same concern with respect to Mr. Geisen's  
16      counsel?

17                  MS. BATY: Well, Your Honor, these  
18      individuals have a personal privacy interest. And  
19      before we can release this information to Mr. Geisen,  
20      we need a showing that Mr. Geisen -- that this  
21      information is necessary to a proper decision in this  
22      proceeding. This information is privileged, and,  
23      therefore, we need a showing that there is a -- Mr.  
24      Geisen has an interest that outweighs the strong  
25      personal privacy interest of the individuals named in

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 that document.

2 JUDGE FARRAR: And if he has that  
3 interest, then you would want us -- if we find that he  
4 has that interest, then you would urge us to release  
5 it under a protective order.

6 MS. BATY: That is correct, Your Honor,  
7 because even -- but furthermore, even under a  
8 protective order, the more people who have access to  
9 the information, there is always -- despite the best  
10 intentions and efforts to keep the -- to keep it  
11 secret, there is always the possibility of inadvertent  
12 release, and so --

13 JUDGE HAWKENS: That's true, but that can  
14 be said under any circumstance where a protective  
15 order is issued. We have to assume that people are  
16 going to comply. That's the whole purpose of a  
17 protective order.

18 MS. BATY: But to the extent that this is  
19 a very strong interest, it is something to be kept in  
20 mind when constructing -- when deciding whether Mr.  
21 Geisen has shown that it is necessary to a decision.  
22 And the Staff's position is that it's not necessary,  
23 because Mr. Geisen has all 274 exhibits, plus another  
24 13,000 documents, and those form the basis of the  
25 order against him, not the OI report.

1 JUDGE FARRAR: Are the agents --  
2 investigative agents going to testify about other than  
3 pictures they took and documents they found?

4 MS. BATY: Your Honor, the Staff does not  
5 anticipate calling the OI agents who prepared the  
6 report as witnesses in this case, mainly because they  
7 do not have firsthand knowledge. We're going to call  
8 people who were witnesses who were at Davis-Besse in  
9 the fall of 2001.

10 JUDGE HAWKENS: Is it your  
11 understanding --

12 JUDGE FARRAR: If you had told Mr. Geisen  
13 that -- Mr. Hibey that back in the summer in response  
14 to his letters, we wouldn't have to be here today.

15 MS. BATY: Your Honor, that -- Mr. Geisen  
16 did not articulate that that was his primary concern  
17 in seeking an unredacted version of the OI report.

18 JUDGE HAWKENS: Is it your understanding  
19 that the factual substance in the OI report does not  
20 stray beyond what's contained in the exhibits?

21 MS. BATY: The OI report does not stray  
22 beyond the exhibits. However, the order against Mr.  
23 Geisen is based on the OI exhibits and other documents  
24 compiled by the Staff during its investigation.

25 JUDGE HAWKENS: I understand.

1 JUDGE TRIKOUROS: So really what we're  
2 doing here is we're trying to weight the probability  
3 that information that's private to some persons, or  
4 that could cause them embarrassment, might leak into  
5 the public domain through a protective order versus  
6 the due process for Mr. Geisen, who is charged with  
7 some very serious -- there are serious allegations  
8 against him.

9 MS. BATY: Your Honor, there are numerous  
10 people who would be affected by the release of the  
11 personal privacy information. And Mr. Geisen is just  
12 one of those people. He is one private citizen  
13 seeking information about other private citizens.

14 JUDGE FARRAR: But he's not a busybody.  
15 All of the FOIA cases involve busybodies who want to  
16 go to The New York Times or The Washington Post and  
17 publish the information. He is not a busybody. You  
18 suspended him effective immediately from his job for  
19 five years.

20 MS. BATY: Yes, Your Honor.

21 JUDGE FARRAR: And you may have had good  
22 and sufficient reason to do that, but it's not a  
23 private right he is defending as a busybody. He is  
24 trying to get his job back.

25 MS. BATY: Yes, Your Honor. But you must

1 keep in mind that these other individuals have a  
2 strong privacy interest that must be -- that must be  
3 weighed against Mr. Geisen's interest. And Mr. Geisen  
4 must show a valid public interest that counterweighs  
5 the personal privacy interest of all those individuals  
6 that would be affected by release of this document.

7 JUDGE FARRAR: Maybe I don't understand  
8 this case. Mr. Geisen knows who all these people are.  
9 He knows who his co-workers were.

10 MS. BATY: Yes.

11 JUDGE FARRAR: If we rule against you, Mr.  
12 Geisen and his counsel would get these matters, and  
13 under pain of 18 U.S.C. 1001, or whatever, they can't  
14 release those to anybody. So other than -- so these  
15 former co-workers of his will now know that Mr. Geisen  
16 knows what the agent summarized their testimony as,  
17 and he can't release it to anybody. What's the  
18 problem?

19 MS. BATY: Well, Your Honor, he hasn't  
20 shown that he has -- that the information is necessary  
21 for a proper decision in this proceeding. You --

22 JUDGE HAWKENS: That may be true, but can  
23 you please answer Judge Farrar's question. What's the  
24 harm to them from releasing it to Mr. Geisen under a  
25 protective order?

1 MS. BATY: Well, to the extent, Your  
2 Honor, that Mr. Geisen would not be prohibited by the  
3 protective order from referring to the OI report  
4 during his -- during the hearing, I mean, the harm to  
5 those individuals is that they will be associated with  
6 this law enforcement document, and that would be -- he  
7 could be -- he could be implicating them and be  
8 accusing them of deliberate misconduct. And,  
9 furthermore --

10 JUDGE FARRAR: Well, then, why can't he --  
11 why can't -- even though all that's at stake in this  
12 -- in the hearing that we'll get to someday, all that  
13 is at stake is -- all that is at stake is his guilt,  
14 he was part of a multi-year transaction.

15 And if he finds out what somebody else  
16 said, isn't it open to him to say, "Wait a minute.  
17 That's what happened. That's why I filed something  
18 wrong, because I got bum information from" -- I'm just  
19 hypothesizing here. Why isn't that a theory of why he  
20 should have this? That somebody else kind of duped  
21 him into doing what he did. Isn't that a legitimate  
22 theory for him to defend himself on?

23 MS. BATY: Yes, Your Honor, but he doesn't  
24 need the OI report to do that, because he has all 274  
25 exhibits, including the transcripts. And that's

1 fundamentally what this comes down to is that Mr.  
2 Geisen has not shown a compelling need for this  
3 information.

4 JUDGE TRIKOUROS: Are these exhibits  
5 covered under protective order?

6 MS. BATY: No, Your Honor, they are not.

7 JUDGE TRIKOUROS: So all of the  
8 information that's in the OI report is currently in  
9 the public domain.

10 MS. BATY: They are currently considered  
11 -- the OI exhibits are public documents.

12 JUDGE TRIKOUROS: Am I missing something  
13 here? How could -- if it's personal privacy and you  
14 want to prevent it from coming into the public domain,  
15 which we just discussed a minute ago, and all of the  
16 information in the OI report is in the 274 exhibits,  
17 and all 274 exhibits are in the public domain, have I  
18 not completed a circle here? Am I missing -- is there  
19 a piece of logic I'm missing?

20 MS. BATY: Yes, there is. Your Honor,  
21 excuse me if I -- there is a piece, because when  
22 you're reading the transcript, you can't -- it's not  
23 obvious to the casual reader whether that person was  
24 interviewed as a witness or whether they were  
25 interviewed as a target of the investigation and were

1 subject to allegations of deliberate misconduct.  
2 That's the difference.

3 When they're associated with the OI  
4 report, which is a law enforcement document, there is  
5 a substantial -- there is the 7-C privacy. It could  
6 -- it could reasonably constitute an unwarranted  
7 invasion of privacy. It's important to keep in mind  
8 that exception 7-C is broader than the other personal  
9 privacy exceptions in Section 6 that requires that it  
10 would -- that release would constitute an unreasonable  
11 invasion of privacy.

12 Here the standard is the low -- the  
13 threshold is lower. It doesn't -- it just has to be  
14 a reasonable expectation. One could reasonably think  
15 that there would be an unwarranted invasion of  
16 personal privacy.

17 JUDGE TRIKOUROS: Even with a protective  
18 order.

19 MS. BATY: Your Honor, once there is a  
20 finding that Mr. Geisen -- that we have a privilege,  
21 that this information is privileged, Mr. Geisen must  
22 show that he -- that this information is necessary for  
23 a proper decision. If you so find that Mr. Geisen --  
24 that this information is necessary for a proper  
25 decision in this proceeding, then we can talk about a

1 protective order, and a protective order would be  
2 appropriate.

3 JUDGE TRIKOUROS: The manner in which you  
4 would make that determination, would -- he doesn't  
5 have the redacted information. As far as I know, all  
6 he has is a statement that something was removed for  
7 deliberative process or for personal privacy. So how  
8 would he be able to make that determination? That's  
9 what I'm curious about.

10 MS. BATY: Well, Your Honor, Mr. Geisen  
11 has been able to distinguish what was withheld for  
12 deliberate -- under deliberative process privilege and  
13 what was withheld under personal privacy privilege.  
14 It was quite clear from the affidavit provided by Mr.  
15 Caputo, the Director of OI, that he was asserting the  
16 deliberative process privilege, and asserting that  
17 privilege only as to the agent's analysis.

18 That is also clear from the Staff's  
19 privilege logs, and it's clear that Mr. Geisen  
20 understands that if you look at his motion. He  
21 clearly understands which pages were removed, because  
22 of assertion of the deliberative process privilege,  
23 and which pages were removed as a result of the  
24 personal privacy privilege.

25 Furthermore, the Staff did comply with the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 Board's guidance in Vermont Yankee as to its assertion  
2 of the deliberative process privilege in this case.  
3 Mr. Caputo personally reviewed the entire OI report  
4 prior to the Staff's assertion of the deliberative  
5 process privilege.

6 Mr. Caputo, as the Director of OI, is the  
7 appropriate person to weigh the agency's duty of  
8 disclosure versus the agency's need to conduct frank  
9 internal debate and deliberations without the chilling  
10 effect of public scrutiny.

11 And also, as a result of the agent --  
12 withholding of the agent's analysis, no facts were  
13 withheld from Mr. Geisen. The facts that are  
14 discussed in the agent's analysis are inextricably  
15 intertwined with those preliminary decisions --  
16 recommendations and opinions of the OI agents who  
17 wrote the report.

18 JUDGE FARRAR: Mr. Caputo gave three  
19 reasons in his affidavit for --

20 MS. BATY: Yes.

21 JUDGE FARRAR: -- why he had to invoke the  
22 deliberative process privilege. Two of them dealt  
23 with confusion between this document and the ultimate  
24 decision reached by the agency on whether to charge  
25 Mr. Geisen. Those are reasons A and C.

1 MS. BATY: Yes, that's correct.

2 JUDGE FARRAR: Who would be confused by  
3 that? Us?

4 MS. BATY: Well, it could confuse -- could  
5 conceivably confuse the issues at hearing to the  
6 extent that Mr. Geisen puts forth the statement of an  
7 OI agent as the final determination of the agency.

8 JUDGE FARRAR: Wait a minute. You think  
9 that would trick us?

10 MS. BATY: It could confuse the issues at  
11 hearing and --

12 JUDGE FARRAR: There's not a jury here.  
13 It's us. Some people have a lower regard for us than  
14 for the people you haul in --

15 (Laughter.)

16 -- from the street on a jury, but that's  
17 not going to confuse us. We know that all -- that  
18 this is how the process works. You collect all this  
19 stuff, and people -- finally somebody at the top says,  
20 "Ah ha, I think here's the way we've got to go," and  
21 that could be a good or a bad decision, but it's the  
22 agency's decision, and the rest kind of moves out of  
23 the way. We're not going to be confused.

24 Now, his middle reason, B, talks about the  
25 real purpose behind the deliberative process

1 exemption. Unfortunately -- you know, fortunately or  
2 unfortunately, what do you do with Vogtle? What do  
3 you do with the Commission's decision in Vogtle, which  
4 said that after these reports become final, and after  
5 the agency takes its action, the Commission expects  
6 these reports will be released?

7 MS. BATY: Well, first of all to the  
8 effects, before Mr. Geisen can have -- before the  
9 Staff -- the Staff has invoked a deliberative process  
10 privilege, and the agent's analysis is protected by  
11 the deliberative process privilege. Assuming that Mr.  
12 Geisen -- that Mr. Geisen can show a compelling need  
13 or special circumstances that entitles him to a  
14 deliberative process privilege, then it would be  
15 appropriate to release -- it might be appropriate,  
16 then, to release the information to him under a  
17 protective order.

18 And I -- I would have to concede that the  
19 issues of confusion as far as the public believing  
20 that the initial impressions of those OI agents  
21 reflected in the report are the agency's final  
22 decisions would be mitigated.

23 However, there is still the possibility of  
24 a chill, because human experience teaches us that  
25 those who expect public dissemination of their views,

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 of their remarks, will often temper their candor in  
2 the future. And so that would still be a concern.  
3 And to the extent that your decision in this case  
4 would be precedential or persuasive, it could affect  
5 other cases.

6 JUDGE FARRAR: And that's exactly what the  
7 D.C. Circuit said about the EPA Administrator's  
8 assistance --

9 MS. BATY: Right.

10 JUDGE FARRAR: -- in the DDT case. That's  
11 not what the Commission said in Vogtle. Are you  
12 suggesting the Commission wrongly decided Vogtle?

13 MS. BATY: No, Your Honor. I was just  
14 about to get to your question about Vogtle.

15 JUDGE FARRAR: I thought that was so --

16 MS. BATY: However, I would -- as I read  
17 the Vogtle case, the Commission did not reach the  
18 issue -- the issue raised by Mr. Geisen, because in  
19 the beginning the Staff stated that it planned to  
20 release the report once the -- it took enforcement  
21 action.

22 The Staff recognized the Montrose Chemical  
23 -- the Commission recognized the Montrose Chemical  
24 case, the one that you have been referring to, in that  
25 decision and left open the possibility that the

1 deliberative process privilege could continue after  
2 the enforcement decision has been made.

3 And, furthermore, there is case law  
4 supporting the proposition -- and it was cited by the  
5 Board in Vermont Yankee, but it's actually a Meril v.  
6 -- Open Market Commission v. Meril. It says that a  
7 document is still a deliberative process document even  
8 after a final decision has been made. And in many  
9 ways, the Staff's OI -- the Staff's order against Mr.  
10 Geisen supersedes the OI report, because that reflects  
11 the Staff's analysis, the story that the Staff has  
12 behind its order, and not the OI report itself.

13 The order against Mr. Geisen is based not  
14 on the OI report but on the 274 exhibits and the other  
15 13,000 documents that have been disclosed to Mr.  
16 Geisen.

17 JUDGE FARRAR: One of the points the Court  
18 of Appeals made in the DDT case was that these  
19 deliberative process memos would be protected because  
20 the Administrator, when he decided the DDT case, put  
21 out a 50-page decision setting forth all his facts and  
22 conclusions and reasoning. We don't have this here.

23 We have orders by a top NRC staff person  
24 saying, "Here is Mr. Geisen and several other people.  
25 Here is what I charge you with." But we don't have

1 that gentleman's analysis of why he reached that  
2 conclusion. And I'm not saying we should have it, but  
3 doesn't that distinguish it from the DDT case?

4 MS. BATY: Well, but the OI agent's  
5 analysis that's in the OI report is not the equivalent  
6 of that. Theirs are the preliminary views that belong  
7 only to those three OI agents who wrote the report,  
8 three OI agents who are -- who will not be called as  
9 witnesses in this case.

10 JUDGE FARRAR: This may be a good time to  
11 come right back to that, because how Mr. Geisen's  
12 counsel proceeds and how we rule may have something to  
13 do with that. You're saying as a representation on  
14 behalf of the Staff that the people who participated  
15 in this investigation and in writing this report and  
16 stating their conclusions -- good, bad; or indifferent  
17 -- are not going to be called as witnesses.

18 And I'll give you my exemption -- other  
19 than for photographs they took and, you know, physical  
20 evidence, they are not going to be called.

21 MS. BATY: That is -- just -- can I have  
22 a moment, please?

23 (Pause.)

24 You're correct. The Staff does not  
25 anticipate calling the OI agents as witnesses. They

1 might be called to introduce their photographs that  
2 they may have taken. We also may need to use them to  
3 introduce transcripts that we intend to use for  
4 impeachment purposes.

5 JUDGE FARRAR: But they're not going to  
6 present hearsay, what we would call hearsay evidence  
7 of what Mr. Smith, employee at Davis-Besse, told them?

8 MS. BATY: That is correct, Your Honor.

9 JUDGE FARRAR: Okay.

10 MS. BATY: And as to the deliberative  
11 process privilege, and Mr. Geisen showing that he has  
12 compelling need or special circumstances, Mr. Geisen  
13 has indicated in his oral argument here today that he  
14 would like to use the OI report to -- for impeachment  
15 purposes or to discover weaknesses in the Staff's  
16 case. And that's -- or that it's relevant or could  
17 lead to the discovery of relevant evidence.

18 And that simply is not enough to show a  
19 compelling need or special circumstances. That's  
20 exactly what the -- what the Commission found in the  
21 Shoreham case, that you need to show more than that.  
22 And he hasn't shown that the material is necessary to  
23 a proper decision in this proceeding, simply -- mainly  
24 because he has access to all of the facts underlying  
25 the OI report, and he has another 13,000 documents

1 that were also used in formulating the Staff's order.

2 JUDGE TRIKOUROS: For both deliberative  
3 process and personal privacy.

4 MS. BATY: That is correct, Your Honor.  
5 Excuse me.' Can you clarify? I'm not sure if I  
6 answered your question properly.

7 JUDGE TRIKOUROS: I'm trying to make a  
8 distinction between the two, because I think it's  
9 important, if one were to argue the deliberative  
10 process is not touchable so to speak. Personal  
11 privacy, on the other hand, can be protected, as we  
12 have discussed.

13 And it just seems to me that when you look  
14 at the likelihood of some leakage through the  
15 protective order versus the allegations that are being  
16 defended, there is a balance there that has to be  
17 drawn. And that's why I keep asking as -- for a  
18 distinction between personal privacy and deliberative  
19 process.

20 MS. BATY: Well, deliberative process  
21 applies to interagency -- inter and intra-agency  
22 documents, and it requires that a document be both  
23 predecisional and deliberative. Personal privacy --  
24 that applies to the identities of individuals. And in  
25 this case, the Staff invoked the deliberative process

1 privilege for sections of the OI report titled  
2 "Agent's Analysis."

3 Now, there are individuals identified in  
4 the agent's analysis, and the Staff claims a personal  
5 privacy privilege on the names of those individuals as  
6 they are discussed in the agent's analysis. But, in  
7 fact, you can distinguish between the two.

8 It is possible -- it would be possible for  
9 this Board, if it found that Mr. Geisen had shown that  
10 the deliberative process material was necessary for a  
11 proper decision in this proceeding, it would be  
12 possible to release that without releasing the  
13 personal privacy information, or vice versa, depending  
14 on what the -- what this Board deemed appropriate,  
15 whether Mr. Geisen had shown that one type of material  
16 was necessary, whereas another type of material was  
17 not.

18 JUDGE FARRAR: Come back -- come back to  
19 my theory that all these people were co-workers and  
20 everyone knew who was involved, and you say you still  
21 have to protect their personal privacy. Is that the  
22 Staff's conclusion about what they would think, or did  
23 you contact them and say, "Would you like us to make  
24 sure your name doesn't get associated in public with  
25 this incident"?

1 MS. BATY: Actually, Your Honor, we did  
2 not contact -- and the individuals have not asserted  
3 an interest. However, the 7-C exemption, there is no  
4 private right of action for the 7-C exemption. An  
5 individual could not come before this Board and  
6 request that this information be withheld. The  
7 agency's -- it is the agency's duty to protect the  
8 personal privacy of these individuals.

9 JUDGE FARRAR: But the individual could --  
10 suppose I was one of these individuals and said, "Gee,  
11 I've gone to a new job, and they think I'm a great  
12 person. I sure hope none of this comes out. Would  
13 you make sure if anyone wants these documents to  
14 protect my personal privacy," and you could say yes or  
15 no, that you think that's a good thing for the agency  
16 to do, and you could protect them.

17 Or one of them could call you and say,  
18 "You know, that was a bad situation there. I think I  
19 was one of the good people. I don't mind if my name  
20 is released." And you might agree or disagree. All  
21 I'm saying is when you claim on behalf of the agency  
22 I think you've conceded this is your theory about  
23 whether these people need protection, it's not based  
24 on any personal interaction with them.

25 MS. BATY: That's correct. But there

1 should not -- you should not infer that these  
2 individuals do not have a privacy interest. The  
3 privacy interest is just as strong. However, it's not  
4 based on a certain individual asserting it, and you  
5 would not expect -- because these individuals don't  
6 know that they were targets, or that they were subject  
7 to allegations. They don't necessarily know, because  
8 this report has not been made public.

9 JUDGE FARRAR: You don't think everybody  
10 there wasn't scared to death when your people were all  
11 over the place, they weren't scared to death that  
12 something they did was going to come back and get  
13 them? Did you ever work in a company? Never mind  
14 that question, but --

15 (Laughter.)

16 Never mind. I'll let you know when you  
17 can ignore me and when you can't.

18 (Laughter.)

19 This was a huge deal. The company paid a  
20 \$30 million fine. This is not, you know, that people  
21 went to work and said, "Hey, it's just another day at  
22 work. Everything is fine here at Davis-Besse." They  
23 knew that they were involved in this. Everybody knew  
24 they were involved in it.

25 MS. BATY: They knew -- they knew that

1 they witnesses and that they were interviewed by the  
2 Office of Investigations, but they don't know -- and  
3 others do not know -- that they were subject to  
4 allegations of deliberate misconduct.

5 JUDGE FARRAR: Okay. If that's really  
6 what you're talking about -- and I told you when I  
7 first read a lot of these things I thought you should  
8 have claimed deliberative process privilege instead of  
9 personal privacy privilege -- couldn't you go through  
10 this and have a lot fewer redactions and protect the  
11 interest you just talked about, as opposed to what I  
12 would call the wholesale redactions we were presented  
13 with? Or do you want us to do that?

14 MS. BATY: Well, Your Honor, for --

15 JUDGE FARRAR: Or would you want another  
16 crack at it?

17 MS. BATY: Can I have a moment, please?

18 JUDGE FARRAR: Yes.

19 (Pause.)

20 MS. BATY: Your Honor, in response, in  
21 conferring with co-counsel and Office of  
22 Investigations, they believe -- Office of  
23 Investigations believes that they redacted the minimum  
24 amount necessary. And the allegation -- where you see  
25 the redaction, sometimes it is necessary to redact

1 more than an individual's name in order to protect  
2 that individual' identity.

3 And that is what the Staff did with regard  
4 to unsubstantiated allegations, and that -- and the  
5 places where you see the redactions of more than just  
6 names is unsubstantiated -- allegations that were not  
7 substantiated against any one individual, any  
8 individual.

9 JUDGE FARRAR: Let's take an example,  
10 because there's -- I hate to think of us going through  
11 this document, because there are hundreds of different  
12 redactions here. Let's take page 48.

13 Mr. Hibey, you can take a rest, because  
14 it's not in the Table of Contents, and it's all  
15 redacted. So --

16 MS. BATY: Well, I'm using my redacted  
17 one, too.

18 JUDGE FARRAR: Here. Here. Do you have  
19 it?

20 MS. BATY: We have both.

21 JUDGE FARRAR: Okay. Page 48.

22 MS. BATY: Page 48.

23 JUDGE FARRAR: That's not listed in the --  
24 the Table of Contents of that is redacted, and so we  
25 can discuss this I think without anybody knowing what

1 we're talking about.

2 MS. BATY: Okay.

3 JUDGE FARRAR: But that -- I would say  
4 that's not the top paragraph. I'm just focusing on  
5 the --

6 MS. BATY: Right.

7 JUDGE FARRAR: -- bottom three paragraphs.  
8 If you handed me this and said, "What's this?" I'd  
9 say, "It looks like it's the investigator's recap of  
10 what he learned from a particular gentleman." I can't  
11 tell if that gentleman was a good guy or a bad guy or  
12 a subject or a target or whatever. Why -- where is  
13 the personal privacy? Not deliberative process.

14 MS. BATY: Yes.

15 JUDGE FARRAR: Where is the personal  
16 privacy of that person involved in those three  
17 paragraphs?

18 MS. BATY: Well, first of all, the  
19 personal privacy exemption, 7-C protects individuals  
20 when they are -- whenever you're associated with a law  
21 enforcement document. You don't have to be a target.  
22 You could be just a witness. But the fact that you're  
23 even discussed in a law enforcement document is damage  
24 -- is at minimum embarrassing and can cause  
25 reputational harm. And then --

1 JUDGE FARRAR: Hold on, because that --  
2 there is maybe where the focus of our attention has to  
3 be. I can understand -- what you just stated is a  
4 perfectly valid principle. I'm asking you if it --  
5 and that would be fine. If the police come around my  
6 neighborhood and start asking my neighbors, "What's  
7 this guy up to?" you know, and then it goes in a  
8 report, and I don't want my neighbors seeing that the  
9 police were interested in me, even though I was  
10 totally innocent, these people -- their neighbors and  
11 their co-workers -- knew they were involved. This was  
12 no secret. These are the people who were on the team  
13 who were doing things.

14 So I'll give you your principle you just  
15 stated, but I ask you to tell me how that principle  
16 applies to page -- to the bottom three paragraphs of  
17 page 48.

18 MS. BATY: The second thing to note is  
19 that this is allegation 1-1. This allegation was not  
20 substantiated -- was not substantiated against  
21 individuals. It was not the -- did not form the basis  
22 for any of the individual enforcement actions taken by  
23 the NRC Staff.

24 JUDGE FARRAR: But you won't give me my  
25 theory that --

1 MS. BATY: Okay.

2 JUDGE FARRAR: -- based on --

3 MS. BATY: I'm about to get to it.

4 JUDGE FARRAR: -- your own introduction to  
5 this, gee, you've got to understand what was going on  
6 for five years to understand what happened here in  
7 2001 and 2002.

8 MS. BATY: But the bottom line is that Mr.  
9 Geisen has not shown a need to know this information.  
10 He has access to this -- the interview referenced  
11 here, Mr. Geisen has the entire interview. It was  
12 included in the exhibits. He hasn't shown that he  
13 needs -- he needs this summary in order to -- this  
14 summary is necessary to a proper decision in this  
15 proceeding.

16 If he were to show that --

17 JUDGE FARRAR: But that assumes you have  
18 correctly invoked the privilege, because if this  
19 document is not privileged --

20 MS. BATY: Your Honor --

21 JUDGE FARRAR: -- if this document is not  
22 privileged, is there any doubt in anyone's mind that  
23 this would be -- would be relevant enough to be  
24 subject to discovery? If it were not privileged.

25 MS. BATY: If it were not privileged, this

1 -- actually, Your Honor, this passage, because it  
2 relates to an allegation -- wilful failure to take  
3 adequate corrective action to implement a modification  
4 and to assure no pressure boundary leakage was  
5 occurring -- this allegation is of minimal, if any,  
6 relevance to this proceeding.

7 It's of minimal relevance to this  
8 proceeding, and it's unlikely to result in -- lead him  
9 to admissible evidence, because he has all of the  
10 facts that underlie this allegation via the exhibits  
11 and the other documents that we provided him. He --

12 JUDGE FARRAR: Then, why didn't you write  
13 that to him back in the summer, and we wouldn't be  
14 here. He wrote you two letters saying, "There's what  
15 I need," and you never told him that.

16 MS. BATY: Your Honor, I did not  
17 personally write those letters, so if you can give me  
18 a moment.

19 JUDGE FARRAR: No, no. Nobody wrote any  
20 letter. He wrote a letter, then he wrote another  
21 letter, then you finally wrote a letter back to him.

22 MS. BATY: Oh. Your Honor, I have -- I  
23 need to -- I'm sorry, that's not exactly my  
24 understanding of what happened. Mr. Geisen wrote us  
25 -- or counsel for Mr. Geisen wrote us a letter. The

1 same day that we mailed our letter -- I believe the  
2 same day we mailed our letter in response to Mr.  
3 Geisen's first letter, we received another letter from  
4 him asking us to respond -- why we hadn't responded.  
5 We had already put our response in the mail.

6 JUDGE FARRAR: Okay. And your --

7 MS. BATY: We have had further discussions  
8 with counsel for Mr. Geisen via the telephone, and we  
9 were actually informed after a teleconference with Mr.  
10 McAleer on July 31st that they didn't -- that further  
11 information from us would not resolve the issue. And  
12 I believe on the status report filed the first week of  
13 August we stated that we had attempted to resolve this  
14 issue and that we were unable to -- that they had all  
15 the information that they were going to get out --  
16 that they needed to bring this motion and that they  
17 did not believe that -- we did not believe that we  
18 could resolve this issue without the Board's  
19 intervention.

20 JUDGE FARRAR: Okay. In your July 12th  
21 letter, you didn't say to him, "Go away. You already  
22 have all of this."

23 MS. BATY: I'm really not in a position to  
24 answer that question, since I was not involved in that  
25 correspondence.

1 JUDGE FARRAR: Okay. I think I had a --  
2 somewhere lurking in here a question pending about  
3 whether you wanted -- or maybe you answered it --  
4 about whether you wanted another chance to reduce your  
5 privacy claims. Or do we have to go through each --  
6 well, let me ask you this. We've got several courses  
7 of action.

8 We can write a general decision on  
9 privacy, and you either win, in which case that's the  
10 end of the case, or you lose and we say, "Give it up  
11 under a protective order." Or you can say, "You know,  
12 maybe we were overbroad here. Give us another crack  
13 at it, and we'll cut back in light of the briefs that  
14 have come in," and so forth.

15 Which of those courses of action do you  
16 want us to follow? Not that we'll take your  
17 recommendation, but which would you prefer?

18 MS. BATY: I need a moment.

19 JUDGE FARRAR: That's okay.

20 (Pause.)

21 MS. BATY: Your Honor, I think I need a  
22 clarification on what -- how you would -- how you  
23 would rule on this. Are you recognizing -- would you  
24 be recognizing our assertion -- that we properly  
25 asserted the personal privacy privilege or that we

1 asserted -- or perhaps that we asserted it overbroadly  
2 but recognize that we do -- there is -- the 7-C  
3 exemption does apply in this case to this OI report?

4 JUDGE FARRAR: Who is asking the questions  
5 here?

6 MS. BATY: Well --

7 (Laughter.)

8 -- I understand that. But it --

9 JUDGE FARRAR: No, no, that's a fair  
10 question.

11 MS. BATY: -- it affects how I respond to  
12 your question, because the Staff believes that if this  
13 -- the Staff's position is this information is  
14 privileged, the personal privacy privilege of 7-C  
15 applies, and that Mr. Geisen needs to show that this  
16 material is necessary for a proper decision in this  
17 proceeding.

18 And so if the Staff were to -- if the  
19 Commission were to -- excuse me. I'm losing my -- we  
20 -- the Staff thinks that it made the minimum  
21 redactions necessary in this case, and it did not --  
22 it erred on the side of disclosure rather than on  
23 withholding the maximum extent it could have.

24 But the Staff does not believe that this  
25 should be disclosed without a showing by Mr. Geisen

1 that he needs -- that this material is necessary for  
2 a proper decision. And Staff urges the Board to find  
3 that this information is simply not necessary for a  
4 proper decision in this proceeding, because Mr. Geisen  
5 has the transcripts.

6 JUDGE FARRAR: And the whole thing can't  
7 be glossed over with a protective order. You made it  
8 clear that's not your position, that a protective  
9 order solves all the problems.

10 MS. BATY: The protective order would  
11 solve the problem only if you find that Mr. Geisen  
12 hasn't -- that this information is necessary for a  
13 proper decision in this proceeding. But unless you  
14 find that that -- that the information is necessary,  
15 a protective order does not solve all of the Staff's  
16 concerns, because Mr. Geisen needs to show a need to  
17 know the information before we -- the Staff can turn  
18 it over.

19 JUDGE HAWKENS: I have a question for you.  
20 If you look to page six, and it can be either copy and  
21 you see -- are you with me?

22 MS. BATY: Yes.

23 JUDGE HAWKENS: -- Allegation 1-2?

24 MS. BATY: Yes.

25 JUDGE HAWKENS: -- presumably all the

1 names there were considered potential targets under  
2 your theory. And I'm wondering why.

3 MS. BATY: Actually in this situation,  
4 this allegation, the staff did -- this is one of the  
5 allegations where the staff tried to do the minimum  
6 amount of redaction necessary because this allegation  
7 formed the basis of the order against Mr. Siemaszko.

8 And that is why this one, the redactions  
9 are much -- it is minimal redaction of names in with  
10 regard to this allegation because it did relate to the  
11 order against Mr. Siemaszko. And Mr. Siemaszko has  
12 requested a hearing.

13 Perhaps as a clarification, when the staff  
14 redacted the OI report, staff was anticipating Mr.  
15 Siemaszko's hearing, the hearings of Mr. Moffitt and  
16 Mr. Miller and Mr. Geisen's hearing. And so it was  
17 redacted -- OI redacted it as if they were giving it  
18 to each of those individuals. And gave them the sum  
19 total of what they would give each of those  
20 individuals.

21 I don't know if that is easy -- it is hard  
22 to articulate but it is sort of intuitively makes  
23 sense.

24 JUDGE HAWKENS: All right.

25 MS. BATY: So that is why that one has

1 much smaller redactions.

2 JUDGE HAWKENS: Can you go to the page  
3 before which deals with Allegation 1-1?

4 MS. BATY: Yes.

5 JUDGE HAWKENS: And you see that you  
6 expunge nearly every name except that of poor Mr. --

7 MS. BATY: Siemaszko.

8 JUDGE HAWKENS: You left him out to hang.  
9 Can you explain that to me? Why are his privacy  
10 interests any less?

11 MS. BATY: Your Honor, I do not know. And  
12 I would suspect that was an oversight on our part when  
13 we were redacting because -- but I can't give you an  
14 answer to that.

15 JUDGE FARRAR: Let me make my earlier  
16 question simpler. Can we write a two-part decision  
17 here? Or do we have to write a 150-part decision?

18 MS. BATY: Two?

19 JUDGE FARRAR: Two parts, you know, here  
20 are the two theories. You win, you lose. Or is it  
21 now incumbent on us to look at every one? Well, you  
22 are saying if you win, it is a two-part decision. We  
23 don't have to.

24 But don't we -- when we got this document  
25 in camera, do we now have the burden of going through

1 each one of these redactions and determining whether  
2 your claim of privilege holds up, which is kind of  
3 difficult for us because we don't understand all the  
4 inter-workings of the allegations and the privacy.

5 Deliberative process is fairly easy to get  
6 a hold of. The privacy thing, the way you have  
7 described it is a bit unusual and would be difficult  
8 for us to do. You would be content with a decision  
9 that says everything that you claim is private is  
10 private. And then there is no need to give it up.

11 MS. BATY: Obviously the staff would be  
12 content with a decision that said that the staff  
13 properly invoked the deliberative process, privilege,  
14 and the personal privacy privilege in Mr. Geisen has  
15 not shown that the material is necessary for a proper  
16 decision in the proceeding. That is the staff's  
17 position.

18 JUDGE FARRAR: Suppose we did that? And  
19 some time from now we have a hearing and we find that  
20 Mr. Geisen is guilty as charged.

21 And he goes to the Court of Appeals and  
22 they get this thing in camera and say wait a minute.  
23 The evidence you put on showed he was guilty but he  
24 was deprived of his discovery rights and didn't have  
25 all this information. And the Board was wrong not to

1 give it to him. So let's do that trial over again.

2 Do we really want to risk that to protect  
3 what seems to be an outer limit theory of privacy?

4 MS. BATY: Your Honor, Mr. Geisen simply  
5 does not have -- this information simply is not  
6 necessary because Mr. Geisen has all of the exhibits.  
7 He has all of the documents. The staff's analysis of  
8 the documents, the staff's final analysis, which is --  
9 it is all contained in the order against Mr. Geisen.

10 The OI report is a deliberative document.  
11 It reflects the opinions and analysis of the OI agents  
12 who authored this document. It does not reflect -- it  
13 is not necessarily the final decision of the NRC  
14 staff. It contains numerous allegations that were not  
15 substantiated either by OI or by the NRC staff when  
16 deciding to issue individual actions.

17 JUDGE FARRAR: In a sense --

18 MS. BATY: Mr. Geisen has all the facts  
19 that he --

20 JUDGE FARRAR: In a sense, you are saying  
21 this document is legally irrelevant to the rest of the  
22 case.

23 MS. BATY: Yes, Your Honor. In fact, it  
24 is.

25 JUDGE FARRAR: In a broad sense.

1 MS. BATY: Yes, it is.

2 JUDGE TRIKOUROS: But earlier when we were  
3 talking about this, you indicated that this report was  
4 greater than the sum of its parts, so to speak. In  
5 other words, it transcended just the individual  
6 exhibits. In other words, there is importance in this  
7 report that is beyond the exhibits.

8 MS. BATY: The importance in this report  
9 beyond the exhibits is that it is a law enforcement  
10 document. And so having one's name mentioned in it  
11 has the potential of embarrassment and reputational  
12 harm.

13 But it is not really -- it is a  
14 deliberative document -- deliberative pre-decisional  
15 document and doesn't reflect the final analysis. What  
16 is harmful to the personal privacy interests of the  
17 individuals is that they are identified in this report  
18 as potential wrongdoers. And that is exactly what 7-C  
19 is supposed to protect.

20 JUDGE TRIKOUROS: Let me ask you -- I  
21 haven't done a search or anything on the report but  
22 were there people whose names were redacted in  
23 multiple areas? Could I say that they never appeared  
24 anywhere in this report?

25 Or in other words, are there people who

1 are totally redacted from this report? Or -- because  
2 I noticed in a number of cases, there were redactions  
3 with people's names but there were other areas of the  
4 report where their names appeared.

5 MS. BATY: Well that reflects the staff's  
6 efforts to redact the minimum amount necessary to  
7 protect personal privacy. The staff -- the names and  
8 other identifying information were removed from  
9 unsubstantiated allegations in Parts 1, 2, and 4.

10 But in Part 3, which deals with Davis-  
11 Besse's responses to the bulletin and also is the  
12 topic of the order against Mr. Geisen, the staff's  
13 redaction only redacted names from the conclusion  
14 section.

15 So the agent's summary of the interview  
16 with an individual would not be redacted. This is  
17 part of the staff's effort to give Mr. Geisen as much  
18 as possible while still protecting the privacy  
19 interests of the individuals effected by this  
20 document.

21 Also, I mean Mr. Geisen has all the  
22 exhibits. He has the list of exhibits used in the  
23 report, referred to in this report, that accompany  
24 this report. There is nothing -- by redacting the  
25 personal privacy information, by redacting the agent's

1 analysis, no facts have been withheld from Mr. Geisen.

2 All that he -- he wouldn't get any new  
3 information by the release of this other than the  
4 ability to probe the mental processes of the agents  
5 who wrote this report. Those agents aren't --

6 JUDGE HAWKENS: Or to embarrass  
7 individuals whose identities are withheld.

8 MS. BATY: Exactly.

9 JUDGE TRIKOUROS: But whose judgment is  
10 that? Is that -- who should make that judgment? That  
11 is the question.

12 MS. BATY: Which judgment?

13 JUDGE TRIKOUROS: You are making that  
14 judgment. Not Mr. Geisen's defense counsel.

15 MS. BATY: Your Honor, I'm not sure that  
16 I am understanding your question.

17 JUDGE TRIKOUROS: You are making a  
18 statement that that information would not be helpful  
19 to Mr. Geisen in his defense. And I'm wondering how  
20 one arrives at that conclusion.

21 MS. BATY: Mr. Geisen needs to show more  
22 than it is just merely helpful or relevant. He needs  
23 to show that the information is necessary to a proper  
24 decision in this proceeding. It is not enough that he  
25 would like to be able to use it to impeach a witness.

1 Or that he would like to use it to find soft places in  
2 the staff's case.

3 That is simply not good enough. He needs  
4 to show it is necessary. And with his access to the  
5 exhibits and the other documents provided by the  
6 staff, he simply -- it is simply not necessary to a  
7 proper decision in this proceeding.

8 JUDGE TRIKOUROS: Well, is there an  
9 obligation on your part to provide a certain amount of  
10 information regarding every redacted piece of this  
11 report?

12 MS. BATY: The staff --

13 JUDGE TRIKOUROS: Or is it sufficient for  
14 you to say personal privacy, that's it? And end it at  
15 that.

16 MS. BATY: The rules require that the  
17 staff provide sufficient information for the opposing  
18 party to assess the privilege asserted. The staff has  
19 provided sufficient information to Mr. Geisen and you  
20 will see this is evidenced by his motion.

21 He provided you with a number of tables  
22 demonstrating that he had sufficient information to  
23 assess the staff's privilege. Furthermore, the staff  
24 was informed by Mr. McAleer that the staff had  
25 provided them with -- in essence that the staff had

1 provided him with sufficient information because he  
2 said oh, we're not going to be able to resolve this  
3 issue. And we are going to have to file a motion to  
4 compel.

5 So I believe that my understanding of the  
6 transactions between the staff and counsel for Mr.  
7 Geisen is that they were satisfied that no more  
8 information from the staff could resolve their  
9 concerns. And they had been given sufficient  
10 information that it was time for them to bring this  
11 motion to compel.

12 JUDGE TRIKOUROS: I will leave that to Mr.  
13 Hibey to agree to or not.

14 MS. BATY: Mr. Hibey was not -- I don't  
15 know whether Mr. Hibey has been privy to some of these  
16 conversations or not. We've been dealing with Mr.  
17 McAleer so I don't know what representations --

18 JUDGE TRIKOUROS: In his opening  
19 statement, Mr. Hibey indicated that there was -- at  
20 least what I heard was that there was not sufficient  
21 information. And perhaps I misheard that. There may  
22 be a controversy here.

23 MS. BATY: There may be a controversy here  
24 however the staff -- what is required by the rules is  
25 sufficient information to assess the privileges

1 asserted. And the staff has complied with that  
2 requirement. And has provided Mr. Geisen with the  
3 additional information requested.

4 JUDGE FARRAR: Have you seen the order in  
5 the Yucca Mountain case?

6 MS. BATY: No, Your Honor, I have not.

7 JUDGE FARRAR: The case management order?  
8 Have you seen the order in the Vermont Yankee cases?

9 MS. BATY: Yes.

10 JUDGE FARRAR: Okay. You might want to  
11 tell your colleagues to look at both of those because  
12 while each Board is separate and independent and will  
13 reach its own decisions until the Commission says here  
14 is the way we want to do it, you all would be well  
15 advised to take a look at those two orders next time  
16 you are claiming privilege.

17 I'm not saying whether you did it here or  
18 not. But that would just be my personal  
19 recommendations that that is the wave of the future.  
20 If you don't like it, you're free to contest it. But  
21 next time somebody sits down, they ought to have those  
22 documents in front of them when they claim privilege.

23 MS. BATY: Well, Your Honor, actually my  
24 co-counsel is signaling me that, in fact, we were  
25 aware of those and did keep those in mind as we did

1 our documents. In fact, the staff did follow the  
2 guidance of Vermont Yankee with regard to Mr. Caputo's  
3 personal review of the OI report prior to the staff's  
4 assertion of the privilege and documentation of that  
5 review.

6 JUDGE FARRAR: I'm talking about all the  
7 columns you would have across saying here is what it  
8 is and here is who wrote it and here is who got it.  
9 And all that.

10 MS. BATY: Right.

11 JUDGE FARRAR: Not a matter -- just, you  
12 know, keep it in mind.

13 MS. BATY: The staff provided the  
14 sufficient information in this case. And also, the  
15 distinction -- and important --

16 JUDGE FARRAR: That is a whole other  
17 argument. I'm not sure you did. I'm not sure you did  
18 the first time. And if we apply to you the same rules  
19 you apply to intervenors with their contentions, your  
20 claim of privilege would be rejected.

21 MS. BATY: Your Honor, also we provided  
22 Mr. Geisen with a redacted report. And we did not  
23 redact conclusions. We did not redact -- Mr. Geisen  
24 can easily tell what the topics were of the  
25 information that was redacted from what the redacted

1 version that he received. We did not withhold the  
2 entire document.

3 JUDGE FARRAR: Well, the Vermont Yankee  
4 and Yucca Mountain rules deal basically with  
5 documents. I don't think they -- and they assume that  
6 you can have one entry for a document.

7 Here is a 230-page document that is kind  
8 of the key document in the case -- or the key summary,  
9 okay, you won't let me say that. Thank you. It's a  
10 summary and so maybe, in my mind, you would have had  
11 more than one entry for that. You would have had  
12 numerous entries filling out the log. But that is not  
13 something that we need to debate here.

14 Mr. Hibey says that Mr. Geisen's private  
15 interest in due process is, in fact, a public  
16 interest. You keep saying oh, this is just a private  
17 interest. As you can see, that is in sort of public  
18 interest.

19 MS. BATY: Well, Your Honor, I don't -- I  
20 understand that he is asserting a public interest but  
21 this proceeding is about whether the order against Mr.  
22 Geisen -- the staff's order against Mr. Geisen should  
23 be upheld.

24 What other individuals knew is not  
25 relevant to this proceeding. And to the extent that

1 Mr. Geisen thinks he needs this case for the criminal  
2 case, the remedy is in District Court and not here.

3 And I think there has been the confusion  
4 between the criminal sanctions that Mr. Geisen faces  
5 and this civil proceeding. And the standards that  
6 should be applied in this civil proceeding versus the  
7 standards that apply in a criminal proceeding. And  
8 the difference between what is at stake in these two  
9 different proceedings.

10 JUDGE HAWKENS: You would concede there is  
11 a public interest in preserving his constitutional  
12 rights before this body?

13 MS. BATY: There is that interest but he  
14 is getting his due process. This hearing is providing  
15 him with due process. And he is not being deprived of  
16 any information. Staff has disclosed 13,000 documents  
17 -- over 13,000 documents to Mr. Geisen. There is no  
18 deprivation of due process in this case.

19 JUDGE TRIKOUROS: I'm sorry. I just will  
20 repeat what I said earlier. The 274 exhibits are in  
21 the public record. And when I asked that -- when I  
22 indicated that earlier, I said therefore anything that  
23 is privacy related in this OI report is in the public  
24 record.

25 You had indicated that the OI report

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 transcends the 274 exhibits. It is an individual  
2 document that is more important, so to speak -- or not  
3 more important but has value in and of itself apart  
4 from the exhibits.

5 Did I misinterpret what -- because my  
6 comment was all the exhibits are in the public record.  
7 Therefore, why wouldn't the privacy information in the  
8 OI report or the redacted portions that are privacy  
9 related, why wouldn't they then be arguably in the  
10 public record and, therefore, should not be redacted?

11 Your answer was that there is an  
12 importance to the OI report beyond the exhibits.

13 MS. BATY: There is a -- it is not an  
14 importance. I wouldn't characterize it as an  
15 importance. The transcripts -- the exhibits are in  
16 the public domain. But when you read an individual's  
17 transcript, it is not clear that that person was a  
18 target of an allegation.

19 JUDGE FARRAR: You don't start that  
20 interview by saying now, Mr. Smith, we want to warn  
21 you? So if read those exhibits, if I read those  
22 transcripts, are you telling me that in none of them  
23 would I find a hint -- not a hint -- would I find --  
24 not written between the lines but written on the lines  
25 that this person is a mere witness or this person is

1 a target?

2 MS. BATY: Your Honor, I'm uncomfortable  
3 with making a categorical statement in response to  
4 your question but I would venture to say that that is  
5 -- that you would not know whether that person was a  
6 target or whether that person was a witness because it  
7 would not say -- there is no explicit statement -- you  
8 understand that you are -- we are investigating you  
9 for a violation of 50.5.

10 JUDGE FARRAR: So your people don't start  
11 the interviews that way? Okay.

12 Why don't you -- well, look how long you  
13 have taken.

14 MS. BATY: I have no idea I have taken.  
15 My attention has been focused on you and not on my  
16 wristwatch.

17 JUDGE FARRAR: And as usual, the Board --  
18 that's why we have oral arguments for us to ask  
19 questions. So certainly -- why don't you wrap up with  
20 any points you want to make. Then I have just two  
21 logistical questions to ask before Mr. Hibey responds  
22 if there is anything you want to wrap up with.

23 MS. BATY: Well, I would reiterate that  
24 the staff has disclosed the 274 exhibits. We have  
25 disclosed over 13,000 documents. No factual material

1 has been withheld from Mr. Geisen.

2 All the facts in the report come from the  
3 274 exhibits. The order against Mr. Geisen is based  
4 on the exhibits and the other documents. It is not  
5 based on the OI report.

6 If Mr. Geisen is looking for the story of  
7 the staff's case against him, it is the order that  
8 contains that story. Mr. Geisen has not made a  
9 showing that the information is necessary for a proper  
10 decision in this proceeding.

11 He needs to show that it is necessary.  
12 And he simply hasn't shown that. His desire to use it  
13 for impeach purposes, his desire to use it to find  
14 weak places in this case is simply not enough to  
15 overcome the staff's valid assertion of the personal  
16 privacy and deliberative process privileges.

17 JUDGE FARRAR: Thank you, Ms. Baty. Two  
18 logistical questions. Page 126, we have the  
19 unredacted version.

20 MS. BATY: But you don't have the redacted  
21 one?

22 JUDGE FARRAR: But that page was missing  
23 from the redacted. So I don't know. We don't know.

24 MS. BATY: Is that the page that we faxed  
25 to you?

1 MR. HIBEY: Yes.

2 MS. BATY: Okay. What is missing -- it  
3 probably got stuck in the copy machine.

4 JUDGE FARRAR: That's fine. Just call Ms.  
5 Perch, you know, this afternoon. And get it to us.

6 MS. BATY: We will provide it, yes, the  
7 redacted version.

8 JUDGE FARRAR: We want the redacted -- we  
9 have the unredacted. We have it. But we don't know  
10 what, in fact, was redacted there. So give us page  
11 126, the redacted version.

12 And second, so I don't forget it later,  
13 this motion to compel has some bearing on a pending  
14 motion to quash Mr. Geisen's deposition in a companion  
15 case. Can the staff tell me was the deposition of Mr.  
16 Cook in the companion cases taken as scheduled? We  
17 denied his motion to quash the deposition. Was that  
18 deposition taken?

19 MS. BATY: It has been rescheduled and  
20 will take place on Tuesday. I think next Tuesday. It  
21 has been rescheduled with counsel and coordinated with  
22 his counsel.

23 JUDGE FARRAR: Okay. Would you be kind  
24 enough at your earliest convenience to send us a copy  
25 of the transcript of that deposition after you get it?

1 MS. BATY: Yes, we will. It hasn't -- we  
2 will -- it will come to the Board, I believe.

3 JUDGE FARRAR: No, no. We don't get  
4 transcripts of depositions because that was --

5 MS. BATY: I understand.

6 JUDGE FARRAR: That was a motion in case  
7 Ms. Penny ever reads this transcript and that was a  
8 motion to quash where the staff made representations  
9 about what might happen at the deposition and why you  
10 needed it. And so we would like a transcript of that  
11 deposition after it takes place.

12 And again, call Ms. Perch, and give  
13 everybody notice that you are sending it to us.

14 MS. BATY: Okay. It should a few days.

15 JUDGE FARRAR: And that is when? Tuesday?

16 MS. BATY: Tuesday, the 12th.

17 JUDGE FARRAR: Okay, find.

18 MS. BATY: So it will be probably the next  
19 Monday that we will get the transcript.

20 JUDGE FARRAR: Right. Whenever you get  
21 it.

22 All right, Mr. Hibey. It is too bad you  
23 didn't save any time for rebuttal because there is  
24 probably a lot on your mind. But why don't you take  
25 a shot anyhow.

1 MR. HIBEY: I'll take a brief shot because  
2 --

3 JUDGE FARRAR: Well, take as long as you  
4 need because this is -- we want to get this right.

5 MR. HIBEY: I did have the unfortunate  
6 feeling of being a viewer rather than a full  
7 participant only because what we are searching for is  
8 something that I haven't been able to eyeball so that  
9 I could be more precise in some of the things I  
10 believe are important to your decision.

11 Nevertheless, the OI report is now  
12 characterized not only as irrelevant to the rest of  
13 the case but it transcends the case. And I think  
14 there is an inherent tension in those particular  
15 remarks.

16 And I think it points up the fact that no  
17 value is assigned to it but from the standpoint of  
18 someone trying to prepare a defense, there is  
19 considerable value because as I pointed out earlier,  
20 certainly to the extent that we expected these report  
21 writers to be witnesses, then their statements would  
22 be important for us to have.

23 Now they represent that they do not  
24 "anticipate" calling them except -- and then there are  
25 a number of exceptions including the completion of the

1 impeachment of a witness by the offering of a  
2 transcript.

3 JUDGE FARRAR: Yes, but if they offer --  
4 in other words, I assume the person, just like a  
5 photograph, would say I interviewed this person. This  
6 is, in fact, a transcript of what he said. It is a  
7 valid transcript.

8 And then Ms. Baty would wave it at us or  
9 say to the witness didn't you say the opposite a year  
10 ago -- three years ago -- from what you just said  
11 today? So I think we have from her about as ironclad  
12 --

13 MR. HIBEY: Commitment?

14 JUDGE FARRAR: -- a commitment that these  
15 people will not be called for hearsay testimony.

16 MR. HIBEY: Then there is also the  
17 question of how we look at a document to ascertain  
18 whether there is something in it that would enable us  
19 to pursue other areas of evidence. So I would ask the  
20 question how would what is characterized as an  
21 unsubstantiated allegation, a very dubious phrase,  
22 contribute to the conclusion that Mr. Geisen -- Mr.  
23 Geisen was involved in a violation of the law?

24 Because in the end, Mr. Geisen is being  
25 blamed with certain misconduct.

1 JUDGE FARRAR: Yes, but you have access,  
2 as I understand what the staff said, you have access  
3 to everything his coworkers said. So why is it -- why  
4 are we not at the point here where we say throw out,  
5 you know, they might do good work, they might not.  
6 I'm not familiar with them.

7 But throw out everything the Office of  
8 Investigations did because they are not involved in  
9 this anymore. You know what Mr. Geisen's coworkers  
10 said. He can read those transcripts and maybe he will  
11 have an ah-hah moment and say ah, that is why I got  
12 duped into signing this or whatever, you know, we  
13 don't know the facts. I'm just hypothesizing.

14 But if we can -- why can't we, for all  
15 practical purposes for the rest of this case, say what  
16 these good people at the Office of Investigations did  
17 is really not going to be in front of us. They were,  
18 in effect, the grand jury. When you go to a criminal  
19 case, you try to disprove the government's case. You  
20 don't try to show that the grand jurors had bad  
21 information put in front of them.

22 MR. HIBEY: No, but you would do when you  
23 had that quantum of information is use that  
24 information as a way of trying to understand the  
25 charges. And to the extent that the OI agents made

1 credibility judgments that vectored in a certain  
2 direction, then at least we know and understand when  
3 we question the witness that purportedly supports that  
4 statement that we will know how to cross examine  
5 further that witness.

6 Now that is a different argument than the  
7 one I made in the beginning when I thought these  
8 people -- these agents themselves were going to be  
9 witnesses. But it is very telltale --

10 JUDGE FARRAR: Wait, wait, wait. Wait a  
11 minute. You guys in your firm have been around a long  
12 time defending a lot of very important people.

13 MR. HIBEY: Yes.

14 JUDGE FARRAR: I suspect that in that time  
15 you have developed some art and science or some  
16 expertise in the art of cross examination.

17 MR. HIBEY: Yes.

18 JUDGE FARRAR: If Mr. Geisen reads these  
19 transcripts, why can't he say to you I don't know what  
20 the agent thought but that guy is not telling the  
21 truth and here is why he is not telling the truth? Or  
22 that guy is telling the truth and he can guide you  
23 into how to cross examine that person.

24 And we don't care what an agent who  
25 probably has a lot less experience than you do in

1 interviewing people, what do we care what he thought?  
2 I mean I'm not denigrating his role in doing his job  
3 for the staff and for the Commission. But you all  
4 have a great deal of experience in this area. Why do  
5 you need what they thought?

6 MR. HIBEY: Because it shaped the case.  
7 And to the extent we understand how the case was  
8 shaped through the actions of these people  
9 scrutinizing and making judgments, credibility  
10 judgments about the witnesses that they are bringing  
11 forward, gives us the opportunity to hone our cross  
12 examination and our impeachment once we are able to  
13 understand the flaw that brought forward the  
14 conclusion that Mr. Geisen, as opposed to somebody  
15 else, was engaged in misconduct.

16 Or that there can be somehow divined from  
17 all of these exhibits evidence of a guilty knowledge  
18 or a deceptive intent on the part of Mr. Geisen and  
19 that is really extremely important because if only the  
20 documents and the testimony were necessary, then why  
21 weren't they just served up in a pile and handed over?

22 Something more transpired. That is the  
23 transcendent element.

24 JUDGE FARRAR: No, that was needed by some  
25 high official in the agency to make a decision whether

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 to issue the charges on January 4th or whatever it was  
2 of this year.

3 MR. HIBEY: But what we also --

4 JUDGE FARRAR: But what the person thought  
5 and what all the people who talked to him thought on  
6 Day One of the hearing when I say Ms. Baty, go ahead,  
7 it is your case, she has got to put on people. She  
8 can't say well here are all the documents we  
9 collected. We are going to need to see some  
10 witnesses.

11 And why -- you keep talking about the  
12 case. The case starts then. Or am I wrong about  
13 that?

14 MR. HIBEY: Well, the case started before  
15 this panel was formed. And the case is embodied in  
16 this compilation known as a report. And what I am  
17 suggesting to the Court is that within that report are  
18 credibility judgments that drove the very expression  
19 of the purpose of the report.

20 JUDGE FARRAR: Okay, so if you went --  
21 suppose we didn't exist and there was some  
22 interlocutory procedure and you went to the Court of  
23 Appeals and say throw this charge out. These people,  
24 whoever signed it, got bum information. People  
25 analyzed credibility incorrectly. There is nothing

1 behind this charge. It should be thrown out.

2 That would be a great argument to make to  
3 the Court of Appeals to get the charge thrown out.  
4 That is not your job in front of us. Your job in  
5 front of us, as you well know, is to disprove these --  
6 not to show that the person made a mistake in bringing  
7 them. But they are not true.

8 MR. HIBEY: That's right.

9 JUDGE FARRAR: And so I'm -- well, go  
10 ahead.

11 MR. HIBEY: Well, the perfect example for  
12 why we don't go to court or why we didn't build in to  
13 the pretrial schedule was time for summary judgement  
14 was because we understand that the critical element to  
15 be decided here is loaded with credibility issues.

16 And to the extent that is report gives us  
17 an understanding of how those credibility issues were,  
18 shall we say, resolved to the conclusion that Mr.  
19 Geisen was guilty of certain offenses is an area that  
20 we feel should not be protected by the existence of  
21 any privilege given the stakes -- given the stakes.

22 We're not here as FOIA people trying to  
23 get information that we can put into a blog. We are  
24 trying to defend ourselves in a circumstance where  
25 this man's livelihood has been taken first.

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 JUDGE FARRAR: Suppose we conclude when we  
2 deliberate that the staff has made a colorable claim  
3 about these privileges and are you, in effect by what  
4 you just said, urging us to err on your side, covered  
5 by a protective order, because of the high stakes  
6 involved to Mr. Geisen?

7 MR. HIBEY: Yes.

8 JUDGE FARRAR: Is that really what you  
9 said?

10 MR. HIBEY: Yes.

11 JUDGE FARRAR: That in this situation, we  
12 err on your side?

13 MR. HIBEY: Yes.

14 JUDGE FARRAR: If you got the stuff under  
15 protective order, you wouldn't come back and say  
16 release the protective -- remove the protective order?  
17 And I know that causes you logistical difficulties.  
18 But if you thought the protective order was  
19 unnecessary, you wouldn't be back telling us to lift  
20 the protective order?

21 MR. HIBEY: No.

22 JUDGE FARRAR: Look at that. I told Mack  
23 we wouldn't possibly go more than two hours. And he  
24 got the jackhammer people to agree to wait until noon.  
25 And you all have messed us up. Go ahead.

1 MR. HIBEY: My staccato response is of  
2 course, we would obey any protective order that is in  
3 place to respect the use of that information. I mean  
4 there is -- it almost goes without saying but I am  
5 happy to say it nevertheless.

6 This is not some kind of fishing  
7 expedition that is simply designed to get things  
8 because this is what defense lawyers do. We really  
9 think we need this. We really think we are entitled  
10 to it. We really think that due process and the  
11 principles of fairness, as contemplated by the concept  
12 of due process, require that this information be given  
13 to us.

14 Whether it has to be given to us under  
15 restricted circumstances, so be it. We are all grown  
16 ups and we know how to behave respecting compliance  
17 with protective orders. So that is not a difficulty  
18 for us. And I think that is really an important  
19 point. So that would be the position we would take in  
20 response to your question.

21 And I think that, in turn, responds to the  
22 question you left me with at the end of earlier  
23 statement. Does a protective order work here? Are we  
24 interested in protecting serial numbers and social  
25 security numbers and addresses and things like that?

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 Yes, of course. We understand that even with what we  
2 are asking for, that kind of respectfulness for the  
3 privacy of others is important.

4 The argument that somehow these people are  
5 going to be subjected to unwanted reputational  
6 vilification is simply theoretical and frankly without  
7 any basis whatsoever in this circumstance. For all  
8 the reasons that the Judges pointed out during the  
9 argument propounded by counsel here, there is no risk  
10 that any person who years later is not charged with  
11 any offenses by the NRC is likely to be subject to any  
12 kind of stigma or ridicule. And we find that there is  
13 nothing in what we are seeking that would put any of  
14 that at risk.

15 JUDGE TRIKOUROS: I had just one question.  
16 And perhaps I am not understanding what Ms. Baty had  
17 said exactly. So -- but let me ask the question.

18 Ms. Baty indicated that you should be able  
19 to make a determination as to the need for this  
20 redacted information and then delineate that. How  
21 would you do that is my question? Do you have enough  
22 information to be able to do that?

23 MR. HIBEY: In broad scope, no. There is  
24 one section of this report that I'll tell you about.  
25 And you can understand from the way in which I

1 describe it how impaired my expression is about my  
2 need. But my need is present nevertheless.

3 We think there is a section in this report  
4 on page 42, and this will give you a sense of how  
5 desperate defense lawyers can be sometimes for  
6 information, I think that is the page we held up to  
7 the light seeing if we could read what was behind it.

8 And we think that the only thing we were  
9 able to spot was really at the very top of the  
10 redaction. We think the name is Goyal. Now if we are  
11 right about that, we haven't got a clue why that has  
12 all been redacted. It just doesn't wash.

13 Goyal, we understand, was, in fact,  
14 charged and he demanded a hearing. And he was  
15 supposed to indulge in the -- engage, if you will, in  
16 the requirements for responses to the charge in due  
17 course. And then we learned in July, this past summer  
18 here, that he withdrew his demand for a hearing. And  
19 has accepted whatever the debarment was with respect  
20 to him.

21 So we don't understand why Goyal, if we  
22 are right about that at the top of that page after  
23 holding it up to the light, why Goyal and everything  
24 in there has been restricted -- redacted. So, no, I  
25 don't think we have enough information to figure out

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 why they did what they did.

2 I mean the business about reputation on  
3 the privacy side I think is met with as much  
4 skepticism as I think I was hearing during the  
5 argument.

6 And with respect to deliberative process,  
7 you know, that's -- we have had a fair amount of  
8 discussion about that. We understand the fluid nature  
9 of pre-decisional documentation. But we also  
10 understand that the character of a document such as  
11 that can change after the decisions have been taken.

12 JUDGE HAWKENS: I cannot read on my  
13 redacted page the identity of that individual. But I  
14 assume that the staff would say this was a charge  
15 investigated and not ultimately pursued against him.  
16 And your response would be?

17 MR. HIBEY: Well, the man has been  
18 charged. We know that. And we know he has taken a  
19 debarment ultimately. What reputation are they  
20 worried about?

21 JUDGE HAWKENS: Was it a charge -- I'm not  
22 sure what charge this was that they were --

23 MR. HIBEY: I don't remember either. But  
24 I would suggest that it doesn't matter because that  
25 kind of picking and choosing smacks more of tactical

1 exercises by the advocates than it is some purportedly  
2 independent decision made by someone sitting over in  
3 the Materials Branch trying to apply the principle of  
4 deliberative process and personal privacy.

5 So I am very troubled by that.

6 JUDGE FARRAR: Hold on, Mr. Hibey.

7 Ms. Baty, we have the affidavit from Mr.  
8 Caputo on deliberative process which just really goes  
9 to a very -- a relatively small portion of this.

10 MS. BATY: That is correct.

11 JUDGE FARRAR: And under deliberative  
12 process -- not the agency head but some high agency  
13 official has to do this -- who did the privacy  
14 redactions?

15 MS. BATY: The Office of Enforcement was  
16 responsible. Excuse me, Office of Investigation. I  
17 misspoke. Office of Investigation took the lead for  
18 all of the redactions in the OI report because it was  
19 their document.

20 JUDGE FARRAR: But Mr. Caputo, whose  
21 office is what?

22 MS. BATY: He is the Director of the  
23 Office of Investigation. He is the Director of the  
24 office that took the -- that was responsible for  
25 redacting the report.

1 JUDGE FARRAR: And so he claimed the --

2 MS. BATY: Deliberative process.

3 JUDGE FARRAR: -- deliberative process but  
4 he didn't personally do the privacy?

5 MS. BATY: He did not personally do the  
6 privacy -- personal privacy redactions, the 7-C  
7 redactions. No, he did not personally do them.

8 JUDGE FARRAR: Should we have asked a long  
9 time ago who did it because it might have a bearing --  
10 not that the law requires that the agency head or  
11 someone like an agency head do it -- but that we would  
12 prefer it be Mr. Caputo's Deputy or one level down  
13 rather than the lowest level investigator's boss?

14 In other words, that even though it is  
15 just privacy not deliberative process, you want  
16 somebody -- the whole trend of those cases, you want  
17 somebody above the fray to say yes, this is really  
18 important to do rather than someone low down.

19 MS. BATY: Your Honor, the OI, as I  
20 understand, the Office of Investigation did the  
21 redactions -- the personal privacy redactions  
22 according to their standard, ordinary practice and  
23 procedures

24 This OI report was not treated any  
25 differently than anything -- any differently than any

1 other one although I believe co-counsel is whispering  
2 in my ear that we didn't redact as much as we would  
3 have. Our 7-C redactions were not as broad as they  
4 would have been -- they could have been and been  
5 supportable according to OI's normal practices and  
6 procedures for OI reports.

7 JUDGE FARRAR: Hold on a minute.

8 Mr. Hibey, thank you for indulging us  
9 while we conferred here.

10 MR. HIBEY: Not at all.

11 JUDGE FARRAR: Mr. Hibey, would you object  
12 to, be in favor of, or have no opinion on whether we  
13 should ask the staff to tell us the name and rank of  
14 the person who made the privacy redactions?

15 MR. HIBEY: I have no objection to that.

16 JUDGE FARRAR: Staff think that that would  
17 be helpful to us?

18 MR. HIBEY: I have no objection to that  
19 question, Your Honor.

20 MS. BATY: Your Honor, the OI agents  
21 responsible for redacting -- doing the personal  
22 privacy redactions were Joe Ulie and Kris Monroe. And  
23 then they brought their redactions to OGC for OGC to  
24 review to see whether they were legally supportable.

25 JUDGE FARRAR: OGC meaning you all? Or

1 somebody --

2 MS. BATY: Yes.

3 JUDGE FARRAR: Not somebody in the  
4 regulations area?

5 MS. BATY: No.

6 JUDGE FARRAR: Somebody in your area?

7 MS. BATY: Yes, that is right.

8 JUDGE FARRAR: What is the rank of those  
9 two gentlemen?

10 MS. BATY: They are both Senior Special  
11 Agents.

12 MR. HIBEY: One of them is signatory to  
13 the report.

14 JUDGE FARRAR: But are they management  
15 level or --

16 MS. BATY: No, they are lead case  
17 investigators. But I don't know if they would be  
18 considered management. OI is a pretty flat  
19 organization. I don't know if the standard Branch  
20 Chiefs and Directors and such apply except that Mr.  
21 Caputo is the Director of the office.

22 JUDGE FARRAR: Okay.

23 MS. BATY: We offer to have Lisa Marie  
24 Jarriel of our Office of Enforcement, who is the  
25 Allegation Coordinator for the agency, review the

1 personal privacy redactions. She is definitely a  
2 person who is independent of this case.

3 JUDGE FARRAR: Is that her sitting back  
4 there?

5 MS. BATY: Yes, that is she. And she has  
6 agreed to this. She has been consulted.

7 JUDGE FARRAR: I had forgotten her last  
8 name she was going by but it ought to be recognized  
9 that her father was once the Chief Judge of this  
10 panel. So I don't know if that gives her more or less  
11 credibility. So you would have her do what?

12 MS. BROCK: Your Honor, if I may, if there  
13 is a concern that these redactions were somehow case  
14 specific --

15 JUDGE FARRAR: No, no, the concern is --  
16 let me state -- if we thought this was an open and  
17 shut case and this was clearly privacy and there are  
18 no questions asked, that would be one thing. Or if we  
19 thought it was spurious, that would be another thing.  
20 Not to tell you where we are going but we are kind of  
21 in between.

22 We want to make sure that when you get  
23 down to the detail of applying that, the people who  
24 applied the privacy principle, in fact, knew what they  
25 were doing in terms of yes, here is this privilege and

1 we know enough to apply it rather than you gave it to  
2 somebody who really didn't have experience in this and  
3 didn't, you know, we can't count on their judgment.

4 MS. BROCK: And I guess our response to  
5 that would be -- and this is Sara Brock for the staff,  
6 in general -- and the reason why we used these two OI  
7 agents is that OI's normal practice in redacting for  
8 FOIA is to have the agents who are most involved in  
9 the case do the redactions because they are the ones  
10 who would most recognize when something would be a  
11 personal privacy.

12 JUDGE FARRAR: In the context of that  
13 case?

14 MS. BROCK: That's right. And so that is  
15 why we used Joe Ulie and Special Agent Kris Monroe.  
16 But if there is a concern about it, we would be more  
17 than happy to have the redactions reviewed at another  
18 level. And we are offering Lisa Marie although we  
19 could try to find someone else and submit an affidavit  
20 saying --

21 JUDGE FARRAR: And her position is what?

22 MS. BROCK: Agency Allegations Advisor.

23 JUDGE FARRAR: Mr. Hibey, what do you  
24 think of that? And I hasten to add, I know Lisa Marie  
25 only by having met her and discussed her father. I

1 have no, you know, no interaction with her in terms of  
2 knowing how she does her job and so forth.

3 MR. HIBEY: Yes, and you don't and I know  
4 less. So I'm not so sure that my endorsement is  
5 anything other than some kind of unfortunate and  
6 unknowing waiver.

7 I'm guided by what the Court believes  
8 would be the appropriate way to proceed here. I will  
9 say that the notion that one of the agents who  
10 actually participated in this investigation very  
11 actively and who was an author of the report, I am  
12 troubled that he is the person who made privacy  
13 judgment.

14 My concern extends even beyond that to  
15 wonderment, if you will, over whether they performed -  
16 - any of the authors performed any role leading up to  
17 Mr. Caputo's rote signing off on the deliberative  
18 process privilege as I think his affidavit strongly  
19 suggests.

20 So whatever the Court decides on the issue  
21 we are discussing right now will be really welcome.

22 JUDGE FARRAR: Let me tell you why we even  
23 entertain things like that and why I've asked both  
24 sides what they think about how we should move forward  
25 is while we try not to take ourselves seriously, we

1 take our work seriously.

2 And this is an important allegation. A  
3 person's livelihood is at stake. And this is an  
4 important juncture in the case and we want to get it  
5 right. And that is why we ask both sides difficult  
6 questions. And are searching for a way to get through  
7 this where both sides might be happy that justice has  
8 been done.

9 And if we have to decide it, we will  
10 decide it. But that's the only reason we are  
11 searching for a, you know, way to handle things. So  
12 we appreciate your statement.

13 JUDGE HAWKENS: Is the staff offering to  
14 do an independent re-review of the privacy assertions  
15 in the document which at least holds out a possibility  
16 for additional releases.

17 MS. BATY: If that is what the Board  
18 wants, then yes, that is what the staff will do. Also  
19 --

20 JUDGE FARRAR: Judge Hawkens' question was  
21 different from that. Forget that we brought this up.

22 MS. BATY: Oh.

23 JUDGE FARRAR: Is this something that you  
24 think would be a good thing to do at this juncture of  
25 the case? And that's -- I'm not trying to put words -

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 - if you think that is a bum idea for you to volunteer  
2 to do this, that's fine. If you think it is a great  
3 idea, say so.

4 MS. BROCK: In all honesty, Your Honor, I  
5 don't think it is a particularly good idea. It's just  
6 if there is a concern -- what I just asked Ms. Jarriel  
7 about is, you know, if you want an independent review  
8 to say basically yes, these are the types of  
9 redactions we do. This is what our normal process is.  
10 This is what our personal privacy -- this is the type  
11 of thing we take out of OI reports.

12 And if -- well, I don't want to prejudge  
13 the review at all. But in general, I think that the  
14 focus of OGC in looking at these was to tell OI that  
15 they had to take out less, not more. So our normal  
16 debates go more -- where Ms. Baty and I are saying you  
17 can't redact that.

18 So I don't know. I wouldn't anticipate  
19 that it would --

20 JUDGE FARRAR: Okay. So sitting here and  
21 hearing all the discussion, you are not anxious to say  
22 oh, let's go back and we can probably release a lot  
23 more if somebody at a higher level looks at this?

24 MS. BROCK: No.

25 JUDGE FARRAR: Okay, fine.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

1 MS. BROCK: I think if we thought you  
2 could release a lot more, we would have done it  
3 initially.

4 JUDGE FARRAR: Okay, fine. Then I hope  
5 that wasn't my idea that turned out to be so bad. It  
6 was probably Judge Hawkens.

7 (Laughter.)

8 JUDGE FARRAR: So we will not do that.  
9 But thank you.

10 And thank you, Ms. Jarriel, for, you know,  
11 at least considering that in trying to work through  
12 it.

13 Mr. Hibey, you want to wrap up?

14 MR. HIBEY: I think I've wrapped it.

15 JUDGE FARRAR: Okay.

16 MR. HIBEY: The basic point being that we  
17 believe that an argument could be made about the  
18 questionable nature of the privilege -- the  
19 deliberative process privilege being exercised. And  
20 we've gotten into the weeds on that subject today at  
21 length.

22 I think that the trump element of this is  
23 the overriding need that we believe we have argued and  
24 demonstrated to you in support of our having access  
25 not only to the information purportedly claimed as

1 privilege under the deliberative process but also  
2 under the personal privacy privilege.

3 And that to the extent a protective order  
4 can be utilized to increase the amount of information  
5 which we might be able to receive as a result of a  
6 ruling that supports our receipt of information, we  
7 would be more than happy to comply obviously with the  
8 requirements of any such order.

9 JUDGE FARRAR: Okay. Thank you, Mr.  
10 Hibey.

11 MR. HIBEY: Thank you, Your Honor.

12 JUDGE FARRAR: We had hoped that the oral  
13 argument would make everything crystal clear and that  
14 we would be able to get a decision out sometime that  
15 last week in September because then we would follow  
16 that up with a decision in the other case on the  
17 motion to quash Mr. Geisen's deposition, some of which  
18 depends on this ruling and some of which doesn't.

19 I'm not sure the case is as simple as we  
20 thought. We will still try to meet that but we will,  
21 in any event, get you a decision on the motion to  
22 quash in the other case -- quash the deposition by the  
23 end of September.

24 I almost said it -- came close to saying  
25 it a few minutes ago. These oral arguments are

1 difficult for counsel. It is not easy to stand up and  
2 be faced with questions.

3 We ask them not because we are hostile to  
4 you personally but because it is important that we  
5 probe both sides as carefully as we can so as to get  
6 all the information we need to write a decision.

7 So we thank Mr. Hibey and Ms. Baty for  
8 your presentations today. They were helpful. It is  
9 not a particularly easy matter. And we will do our  
10 best to get you a decision as quickly as possible.

11 And if the Court Reporter would be good  
12 enough to go back to the beginning where I said we  
13 would be done in well under two hours and just change  
14 it to well over two hours, we'll be just fine.  
15 Obviously, Reporter, don't do that. But the extra  
16 time was, I think, very well spent as we explored  
17 this.

18 So thank you very much. And stay there  
19 and we will come down and say hello to you all.

20 (Whereupon, the above-entitled oral  
21 argument was concluded at 12:29 p.m.)

22

23

24

25

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

[www.nealrgross.com](http://www.nealrgross.com)

CERTIFICATE

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

Name of Proceeding: Oral Arguments

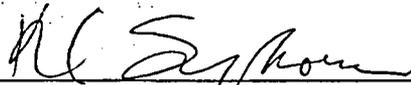
In the Matter of

David Geisen

Docket Number: IA-05-052

Location: Rockville, Maryland

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.



Katherine Sykora  
Official Reporter  
Neal R. Gross & Co., Inc.

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com