

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Hearing ITMO David Geisen

Docket Number: 1A-05-052; ASLBP No. 06-845-01-EA

Location: Rockville, Maryland

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the matter of: : Docket No. 1A-05-052

DAVID GEISEN : ASLBP No. 06-845-01-EA

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Tuesday,

November 14, 2006

Rockville, Maryland

BEFORE:

MICHAEL C. FARRAR, Chairman

E. ROY HAWKENS, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

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

(2:30 p.m.)

1  
2  
3 CHAIRMAN FARRAR: Good afternoon. We're  
4 here for another oral argument in the David Geisen  
5 enforcement case arising out of events of several  
6 years ago involving safety and informational issues at  
7 the Davis-Besse nuclear powerplant.

8 I'm Mike Farrar. I'm the Chairman of this  
9 Board. With me are my brother judges Roy Hawkens, a  
10 legal member; and Nick Trikouros, a technical judge;  
11 and Meg Parish, our law clerk.

12 Staff motion, do you have for the Staff?

13 MS. CLARK: I am Lisa Clark for OGC. With  
14 me is Brett Klukan and Michael Spencer.

15 (Whereupon, at 2:31 p.m., the proceedings  
16 in the foregoing matter went off the  
17 record briefly due to audio problems.)

18 CHAIRMAN FARRAR: All right. Go ahead,  
19 Ms. Clark. We were interrupted there by a sound  
20 system problem.

21 MS. CLARK: And then, to my left is  
22 Richard Poole, and to his left is Tom Ballantine.

23 CHAIRMAN FARRAR: Glad to have you with  
24 us, and thank you for accommodating our request that  
25 you be here.

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1 For Mr. Geisen?

2 MR. HIBEY: I'm Richard Hibey. With me is  
3 Andrew Wise, Charles McAleer, and Matthew Reinhard.

4 CHAIRMAN FARRAR: Let me do a couple of  
5 administrative things first. You all are asking for  
6 more time to work out the details of the protective  
7 order accompanying our order about the redacted  
8 document. I was away when that came in, which is why  
9 it hasn't been granted.

10 But before we grant it, does that come up  
11 with a representation that neither side is going to  
12 attempt to take an appeal? Or is -- and the reason I  
13 ask that is it ties in with the end of written  
14 discovery, which will become important to us as we go  
15 through the afternoon.

16 MS. CLARK: The Staff is not intending to  
17 appeal.

18 CHAIRMAN FARRAR: Okay. Thank you. We'll  
19 issue -- we'll grant the motion, then, when we get  
20 back to our offices. That being the case, that little  
21 timetable for when written discovery is over depends  
22 on the motion to compel, which we will now be over in  
23 short order. But you also have until December 1st to  
24 file motions on the written discovery responses. Do  
25 you think you'll be filing motions, or does it seem

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1 like you'll have that resolved?

2 MS. CLARK: From the Staff's viewpoint, I  
3 think it's likely we will be filing motions.

4 CHAIRMAN FARRAR: And how about you, Mr.  
5 Hibey? Mr. McAleer?

6 MR. MCALEER: Your Honor, it is quite  
7 possible that we will be filing motions as well, but  
8 we'll try to resolve as many issues as possible.

9 CHAIRMAN FARRAR: Okay. Well, that would  
10 mean, then, if you file motions December 1st,  
11 depending on how difficult they are and how much we  
12 choose to write or not write, we could be looking at  
13 the end of December where written discovery would be  
14 over. So let's kind of keep that in mind as we talk  
15 about that when it becomes critical later on in the  
16 argument.

17 If the parties have no objection -- none  
18 of us up here have any experience whatsoever in  
19 criminal law -- and since much of the motion and the  
20 responses deal with exactly how the Grand Jury  
21 information will or will not be available, we think if  
22 parties don't object it would be more efficient use of  
23 our time if we tried to deal with that issue first,  
24 hearing first from the Department of Justice on that,  
25 and then from Mr. Hibey.

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1 I would assume you've had some years of  
2 experience in criminal law, and we would try to get  
3 that resolved, so that we have a context for the rest  
4 of the argument.

5 It goes without saying, but I'll say it  
6 anyhow, all lawyers are officers of the court. We  
7 have, Mr. Hibey, your request to cross examine the  
8 Justice lawyers, which we denied, and the obvious  
9 reason is any lawyer who appears in front of us has  
10 the obligation when they make representations to a  
11 court or to a board to do so with the utmost honesty  
12 and integrity.

13 Judge Hawkens and I worked for -- you for  
14 much longer than I did -- for the Department of  
15 Justice, and that was certainly the rule we followed,  
16 so that's what we will expect from both sides.

17 MR. HIBEY: May I make it clear, Your  
18 Honor, that I never intended that the Justice  
19 Department lawyers be put under oath when I made my  
20 request. I always understood, having been an  
21 assistant myself at one time, that our obligation is  
22 clear.

23 CHAIRMAN FARRAR: Well, when you express  
24 an interest in asking him questions, we assume that  
25 both sides will be satisfied when it's over that we

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1 have asked the other side the questions that are  
2 needed. And just so you all know, from the Department  
3 of Justice, we are very active in terms of asking  
4 questions. So that has been our practice here, so  
5 don't take it personally.

6 When you -- oh, who's going to make the  
7 argument, or --

8 MR. POOLE: Your Honor, we're prepared to  
9 address the court's questions. I don't have a  
10 prepared argument, but we're here to address any  
11 questions.

12 CHAIRMAN FARRAR: Okay. Why don't you  
13 take the podium, if you would. And you are Mr. Poole?

14 MR. POOLE: Yes, Judge. I'm Richard  
15 Poole. I'm a Senior Trial Attorney at the  
16 Environmental Crime Section in the Department of  
17 Justice.

18 CHAIRMAN FARRAR: Okay. And do not assume  
19 we know anything about how law is practiced in front  
20 of a Grand Jury.

21 MR. POOLE: Okay.

22 CHAIRMAN FARRAR: You cannot be too simple  
23 for our taste.

24 MR. POOLE: All right. Well, a bit more  
25 introduction, I'm a federal prosecutor and have been

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1 a federal prosecutor since 1983, so I've spent a  
2 considerable amount of time in the criminal justice  
3 system and have had previous experience with parallel  
4 proceedings like this one where there is a criminal  
5 case and a civil case going on simultaneously on  
6 related subject matter. I can say that --

7 CHAIRMAN FARRAR: Let me ask you some of  
8 the questions, just to show how basic our needs are.

9 MR. POOLE: All right.

10 CHAIRMAN FARRAR: I am an ordinary person.  
11 I walk in to a U.S. Attorney and I say, "I know my  
12 neighbor is engaged in insider trading." And they  
13 say, "Good, thank you very much." And the U.S.  
14 Attorney forms up a thought, "I'm going to put this  
15 fellow in front of a Grand Jury, and we're going to  
16 start a proceeding," you know, look into the  
17 neighbor's activities.

18 I, the person who came into the U.S.  
19 Attorney's Office, am always free to walk over to the  
20 Securities and Exchange Commission, am I not, and tell  
21 them the same story, or am I precluded from doing that  
22 after you launch the Grand Jury investigation?

23 MR. POOLE: When a witness testifies in a  
24 Grand Jury, the witness is the only person in the room  
25 who is not bound by the obligation of secrecy. The

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1 prosecutor, the jurors, the Court Reporter are all  
2 bound by an obligation of secrecy, but the witness is  
3 not.

4 CHAIRMAN FARRAR: Okay. For this purpose,  
5 is the staff investigator who -- the staff  
6 investigators who did all the work, are they  
7 witnesses, or are they quasi-prosecutors?

8 MR. POOLE: Closer to the latter. Under  
9 the Rules of Criminal Procedure, if Grand Jury  
10 materials are shown to an investigator, the prosecutor  
11 must inform the investigator of his obligations to  
12 maintain the secrecy of any information that he  
13 obtains through the Grand Jury. So --

14 CHAIRMAN FARRAR: Okay. Information he  
15 obtains through the Grand Jury. But if the  
16 investigator walks into the Grand Jury already having  
17 all the information from work he or she had done  
18 outside, is that investigator precluded from going  
19 somewhere else with it?

20 Now, as I -- the way I thought about it  
21 was if you subpoena someone to come in to the Grand  
22 Jury, and that's how you get their testimony,  
23 obviously, the prosecutor and everybody else can't  
24 talk about it. The witness can talk about it. But  
25 where the investigator has come up with the

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1 information independently, and you bring them into  
2 your Grand Jury, why is that independent knowledge  
3 they had, why is that now cloaked for some secrecy, or  
4 is it?

5 MR. POOLE: The answer to that question is  
6 a little bit involved. Let me say, in an  
7 investigation of a major case like this one, the  
8 investigation can go on for months or years. There  
9 can be millions of documents. There can be hundreds  
10 of witnesses, hundreds of people interviewed, and many  
11 witnesses in the Grand Jury.

12 During the course of the investigation,  
13 investigators learn new facts from Grand Jury  
14 transcripts that they read, they can learn new facts  
15 from documents that are subpoenaed by the Grand Jury,  
16 and they can use these new facts to further question  
17 new witnesses.

18 Now, at the conclusion of a major  
19 investigation, it's simply impossible to unscramble  
20 the sources of all the different pieces of information  
21 that you learned during the course of the  
22 investigation. For that reason, the policy of the  
23 Department is to advise investigators who are on the  
24 6-E list that they must not, during the pendency of  
25 the criminal case, assist in a civil proceeding.

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1           The reason for that is that, as the  
2 Supreme Court has said, it is an abuse of the Grand  
3 Jury process to use it to assist a civil case. Of  
4 course, once the trial is done, then there is no  
5 further Grand Jury process or other process to be  
6 abused, and at that it's just easier to release agents  
7 to assist in civil proceedings, but not during the  
8 pendency of the proceeding and that's the consistent  
9 policy that's followed in parallel proceedings.

10           CHAIRMAN FARRAR: I can understand why  
11 that's a Department of Justice policy, because it  
12 saves you a lot of hassle. In other words, if that's  
13 the blanket, 100 percent rule, then you're not going  
14 to spend a lot of collateral time dealing with if some  
15 investigator releases. So that's a good policy for  
16 you to follow.

17           But like all policies, there have to -- I  
18 would assume there are times when the policy you're  
19 trying to serve to keep from getting your case mixed  
20 up and having to go to all of these collateral  
21 hearings, that that policy could be overridden by a  
22 policy that says there is a good and sufficient  
23 purpose served in this instance by not enforcing that  
24 policy, if it's not required by any Supreme Court or  
25 other precedents or any statutory provisions. How

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1 would you respond to that?

2 MR. POOLE: Well, frankly, Judge, it's a  
3 line that we do not cross, and, frankly, we don't  
4 dance very close to the line. The reason is that  
5 violations of Rule 6(e) are punishable both under the  
6 rules of -- professional rules, ethical rules applying  
7 to attorneys, and also as a contempt of court. So we  
8 don't need to something like that, at least in that  
9 respect.

10 JUDGE HAWKENS: When a trial is completed,  
11 or the proceeding is completed, the need for secrecy  
12 is diminished.

13 MR. POOLE: Judge, you said it just the  
14 right way. At some point in the proceeding, usually  
15 at the point at which there is either a conviction or  
16 acquittal, the need for secrecy tends to be  
17 diminished. I mean, the likelihood of witness  
18 intimidation is diminished, the likelihood of juror  
19 intimidation is diminished, the possible reputation  
20 effects to uncharged parties are diminished after the  
21 trial is over. Some of those concerns still exist.

22 Whether or not a disclosure order is  
23 issued by a court is discretionary with the court.  
24 And I've seen instances where they were denied and  
25 instances where they were granted. But certainly --

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1 certainly, there's a better shot after the proceeding  
2 is over.

3 JUDGE HAWKENS: And does that include an  
4 appeal?

5 MR. POOLE: Well, that's an interesting  
6 question that we were discussing before we came to see  
7 you. My opinion, without researching it, is that once  
8 there is a conviction, double jeopardy attaches. If  
9 there is -- if a conviction were returned, likely that  
10 would be the end of the case.

11 If a conviction were upheld, it's still  
12 the end of the case, and there's no possibility --  
13 well, there's an argument that so long as we're asking  
14 questions about the subject matter the case was tried  
15 upon, the argument could be made that there is no  
16 possibility of incriminating yourself, since you've  
17 already been convicted. But I suppose there could be  
18 countervailing arguments, and so there's not a  
19 guarantee that there wouldn't be a 17:51:50 at that  
20 point.

21 CHAIRMAN FARRAR: And there could be a  
22 procedural reversal on appeal that would lead to a new  
23 trial as opposed to an acquittal.

24 MR. POOLE: Yes, I think that's correct.

25 CHAIRMAN FARRAR: Okay. Under what

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1 circumstances -- let me -- the preface is there are  
2 some provisions in the rules about exceptions for  
3 this, and under what circumstances will you go to a  
4 District Judge and say, "We under the rule, but here  
5 is a case where there is an overriding public interest  
6 that would justify the disclosure under very limited  
7 circumstances of the information, and we urge you to  
8 allow us to disclose it." What are the rules or  
9 policies that govern that?

10 MR. POOLE: I don't know that there are  
11 any hard line policies as to whether and when  
12 Department of Justice attorneys shall -- or should --  
13 seek such an order. I believe there are not. But as  
14 a matter of practice, and my experience, that  
15 typically happens after the conclusion of the criminal  
16 trial. I can't think of a counter example.

17 CHAIRMAN FARRAR: How about if you have a  
18 memorandum of understanding with a sister, although a  
19 lower ranking agency in the eyes of anyone who has  
20 ever worked for the Department of Justice, what if you  
21 have a memorandum of understanding with a sister  
22 agency if they will really help you do your job, and  
23 they say, "We need your help doing our job," doesn't  
24 that create some tension where you -- not you  
25 personally, but the Attorney General or the Assistant

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1 Attorney General for the Criminal Division, it's  
2 agreed with the Commissioners that you are going to  
3 mutually help each other, doesn't that come into play?

4 MR. POOLE: It doesn't eliminate the  
5 underlying problem, which is that the Supreme Court  
6 has said that using the Grand Jury and the Grand Jury  
7 process to aid a civil case can be an abuse of the  
8 process. And while the case is still pending, we  
9 believe that implication about their design.

10 CHAIRMAN FARRAR: So if the NRC  
11 investigator had done an investigation on his or her  
12 own for a year, and you learned about it and said,  
13 "Wow, that's great. We didn't know you were doing  
14 that. Come in and talk to our Grand Jury," it was  
15 really that cut and dry and that isolated, are you  
16 saying you couldn't stand back and say, "Well, the NRC  
17 investigator did it, they have their own investigation  
18 going on, it's clearly -- it wasn't generated by the  
19 Grand Jury, although it was reported to the Grand  
20 Jury, would you be taking the same position in that  
21 case?

22 MR. POOLE: If the case were that stark,  
23 no, sir. The difference -- the distinction here is  
24 that, I mean, in your hypothetical the agent merely  
25 reported information to the Grand Jury and had no

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1 further involvement. In a situation where the agent  
2 also receives information from a Grand Jury and  
3 participates in its work, you've got a different  
4 situation.

5 JUDGE HAWKENS: What about if the Grand  
6 Jury material is released to the defendant?

7 MR. POOLE: Well, it's done so with the  
8 understanding that it's released to them for the  
9 purposes of the -- of preparing and trying the  
10 criminal case and not for other purposes.

11 JUDGE HAWKENS: But all of it is released  
12 to the defendant?

13 MR. POOLE: Not necessarily. But in this  
14 case, much or all of it has been.

15 JUDGE HAWKENS: And when you say "with the  
16 understanding," are they -- is the attorney then --  
17 what type of enforcement mechanism or sanction, what  
18 consequences would flow from not using that excuse  
19 before the criminal proceeding?

20 MR. POOLE: Help me out on this Tom, if I  
21 get it wrong, but I believe we have an order from the  
22 court.

23 JUDGE HAWKENS: Okay.

24 MR. POOLE: This is Tom Ballantine, co-  
25 counsel in the criminal case.

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1 MR. BALLATINE: There's a word -- I  
2 believe you state that it's -- you reiterate that it's  
3 sanction, but it doesn't require for Mr. Hibey to  
4 state his claim, because obviously he's going to be  
5 working with that material for Mr. Geisen's criminal  
6 case.

7 JUDGE HAWKENS: Does it require him not to  
8 have any contact with this proceeding?

9 MR. BALLATINE: In terms of presenting it  
10 as an exhibit?

11 JUDGE HAWKENS: Yes.

12 MR. BALLATINE: I don't know off the top  
13 of my head.

14 JUDGE HAWKENS: Okay. Sorry we didn't  
15 review that order, but there is an order on the  
16 record.

17 CHAIRMAN FARRAR: Does it preclude him  
18 from showing it to his neighbor?

19 MR. POOLE: I don't have the order in  
20 front of me, but I believe the spirit of it was that  
21 it said it wouldn't be used for preparing the --  
22 legitimate preparation for the criminal case.

23 CHAIRMAN FARRAR: You can see where I'm  
24 headed. The problem, if it doesn't preclude him from  
25 using it in this case, and it doesn't preclude him

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1 from showing it to his neighbor, that creates a  
2 conundrum that the staff person did all the work. You  
3 said it wasn't that cut and dry, but did a lot of the  
4 work, gives it to the defendant, but the person who  
5 employed the staff investigator can't use it. If I  
6 was writing the law, I wouldn't start out with that as  
7 my rough draft of how the law ought to look.

8 MR. POOLE: I can tell you how this is  
9 handled in other parallel proceeding cases. In the  
10 Defense Department, for example, they have -- it's  
11 common for there to be defense procurement fraud cases  
12 in which there is a debarment proceeding going on, and  
13 in those cases what the Defense Criminal Investigative  
14 Service does is to set up two teams, one a civil team,  
15 one a criminal team. And they may, in fact, during  
16 the investigation pre-Grand Jury be one team.

17 But at the point of the beginning of the  
18 Grand Jury investigation, they split, and that way  
19 there are no eggs unscrambled. And I know NRC is a  
20 smaller agency, and has fewer staff than the  
21 Department of Defense does, but that's -- that's the  
22 way it's typically handled.

23 CHAIRMAN FARRAR: And you understand we  
24 don't want to do anything that messes up your policies  
25 and your functions, but we do have this small problem

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1 with the order depriving Mr. Geisen of his livelihood  
2 was made immediately effective. And if we just grant  
3 a stay order, that's fine for you, that's fine for the  
4 staff, but it's not fine for Mr. Geisen, and that's  
5 why we asked you here, to make sure we understand  
6 exactly what the situation is, because the application  
7 of this policy has put this proceeding into a  
8 scrambled sort of situation.

9 MR. POOLE: Your Honor, may I give you  
10 some context for your thinking about this?

11 CHAIRMAN FARRAR: You can give me some --  
12 if you really want to call it advice, you can give me  
13 advice.

14 MR. POOLE: The return of an indictment in  
15 a criminal case is a significant event. I know it's  
16 referred to in the Staff's pleadings as, you know, a  
17 decision of the prosecutors. But in truth and fact,  
18 what it is is a decision of a Grand Jury. The Grand  
19 Jury convened by a Federal Court made a decision that  
20 there was probable cause to believe that Mr. Geisen  
21 knowingly made false statements to the Nuclear  
22 Regulatory Commission.

23 Now, the decision of the Grand Jury with  
24 respect to that probable cause is significant, and, in  
25 fact, Federal District Courts defer to that decision.

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1 They don't second-guess the jurors on the facts, and  
2 the Supreme Court has said that an indictment returned  
3 by a validly empaneled Grand Jury which is not  
4 defective on its face is entitled to go to trial. So  
5 we suggest that -- that an amount of deference is  
6 appropriate.

7 CHAIRMAN FARRAR: Okay. Why don't we do  
8 this -- thank you both for coming here at our request,  
9 and for helping us with this.

10 Why don't we hear from Mr. Hibey on -- Mr.  
11 Hibey, we would like you to address not the motion but  
12 the points Mr. Poole has raised, and whether that's  
13 consistent with your understanding of how the law is  
14 practiced. And, Mr. Poole, if you would be kind  
15 enough to remain here.

16 MR. POOLE: I'll remain. And before I go,  
17 Judge, I would like to address one thing. Our  
18 reluctance to appear before you is not the result of  
19 any disrespect for this Board or the Commission. In  
20 fact, there is always a presumption against extra  
21 judicial statements by prosecutors when a criminal  
22 indictment is pending, for lots of reasons.

23 One is the suggestion could be made that  
24 they are attempting to prejudice the jury pool or to  
25 intimidate the defendant or to try to gain unfair

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1 advantage, for example in this situation, by tilting  
2 an administrative proceeding one way or another.

3 We discussed our appearance here on  
4 multiple occasions with our office's Professional  
5 Responsibility Officer, and we're here with his  
6 knowledge and agreement. But there was a lot of  
7 concern just for those reasons.

8 CHAIRMAN FARRAR: I appreciate that, and  
9 thank you.

10 Mr. Hibey, if you'd like to tell us  
11 whether you agree with the representations about how  
12 things are done, and any other thoughts you have on  
13 whether they ought to be done that way.

14 MR. HIBEY: I'm not sure, based on what I  
15 heard, we've gotten to the meat of some of the issues  
16 that I think would inform this Panel about the  
17 workings of a Grand Jury and about the workings of a  
18 Grand Jury in this case.

19 I would also say I'm not sure I  
20 understand, but I guess I'm going to find out before  
21 the day is out, fundamentally the relevance of what  
22 we've just heard, the issues that are of concern to  
23 the Panel on the basis of the motion to abate. That  
24 said --

25 CHAIRMAN FARRAR: We'll get to that.

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1 MR. HIBEY: I'm sure we will. That said,  
2 the witness is the only person in the Grand Jury free  
3 to speak about what transpired in the Grand Jury. The  
4 prosecutor, the Court Reporter, the interpreter, the  
5 grand jurors themselves, may not disclose the content  
6 of what transpired.

7 I agree, also, that government personnel  
8 assisting a prosecutor in the discharge of his  
9 responsibilities before the Grand Jury is also bound  
10 by the rules of confidentiality with respect to the  
11 Grand Jury information to which he has, under the law,  
12 become privy. And the word "privy" is right out of  
13 the statute.

14 The Grand Jury information that I  
15 understand is the subject of that confidentiality is  
16 that which was obtained under the authority of the  
17 sitting Grand Jury, thus the witness in the Grand Jury  
18 room, thus the documents obtained by a Grand Jury  
19 subpoenaed duces tecum, which brings into the  
20 government's possession documents that the government  
21 then uses as it wishes in the course of its  
22 investigation.

23 The larger question -- let me stop there  
24 and state what my understanding is of the rationale  
25 behind that. The rationale behind that requirement of

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1 confidentiality is to ensure that the deliberations of  
2 the Grand Jury, the law presuming that the Grand Jury  
3 is an independent body uninfluenced by the presence of  
4 a prosecutor, unencumbered by the presence of a  
5 defendant exercising their right of confrontation and  
6 cross examination and involvement in the Grand Jury,  
7 that the deliberations of the Grand Jury remain  
8 unimpeded, pure if you will.

9 The larger question has to do with the  
10 treatment of information that the prosecutor obtains  
11 outside the Grand Jury. I think it's clear from my  
12 experience that the practice of the Justice Department  
13 has always been to behave in a very restrictive  
14 fashion in terms of disclosing information during the  
15 pendency of a Grand Jury investigation but not  
16 obtained by the Grand Jury or by the process --  
17 subpoena process that the Grand Jury -- under the  
18 auspices of the Grand Jury.

19 So that if the government obtains a  
20 statement, for example, of a witness that it  
21 interviews outside the presence of a Grand Jury, and  
22 perhaps in the presence of that witness' lawyer, I  
23 would maintain that that is not a Grand Jury -- that  
24 is not Grand Jury evidence.

25 CHAIRMAN FARRAR: Your suggestion here is

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1 that we -- at this stage of the game, we don't know as  
2 a matter of fact where the material in question --  
3 where and how it was generated.

4 MR. HIBEY: Well, the material that I was  
5 referencing in our papers to describe that the  
6 government has knowledge and information of what Mr.  
7 Geisen has said is --

8 CHAIRMAN FARRAR: Not what Mr. Geisen  
9 said. I'm talking -- I'm mainly concerned with the  
10 staff investigative persons.

11 Mr. Poole, maybe you know the answer to  
12 this. When was the Grand Jury convened?

13 MR. POOLE: November 2003, I believe, Your  
14 Honor.

15 CHAIRMAN FARRAR: The Office of -- the OI  
16 report that we've just been dealing with was dated  
17 August of 2003?

18 MR. POOLE: Yes. So the information in  
19 the report is available for use in other instances  
20 outside of criminal proceedings.

21 CHAIRMAN FARRAR: Right. But the point I  
22 was getting to is that the staff inspector/  
23 investigator who did that work had it all done by the  
24 -- before the Grand Jury convened, so why can't we  
25 just ask you to go to the -- either to recognize that

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1 or to go to the District Judge out of an abundance of  
2 caution and say, "Here is the timing on this. This is  
3 one that is outside the ambit of the Grand Jury  
4 secrecy rules and ought to be available to the very  
5 staff which created it before the Grand Jury was ever  
6 convened."

7 MR. POOLE: The reason, Judge, is that the  
8 duration of time of doing a Grand Jury investigation  
9 is a long one. And new information that is gathered  
10 occasionally reframes, you know, the allegations, and  
11 they might or might not be identical to the  
12 allegations in the report. And at the conclusion of  
13 a lengthy investigation, it's simply impossible in  
14 terms of the information or opinions about that  
15 proceeding in front of the Grand Jury.

16 CHAIRMAN FARRAR: So, in your mind, even  
17 if we conclusively establish that the investigator had  
18 completed the work before November 2003, because the  
19 investigator later participated in the Grand Jury  
20 proceeding, Ms. Clark can't ask him a question because  
21 she -- the answer she gets may be a tainted answer, a  
22 Grand Jury proceeding tainted answer.

23 MR. POOLE: That is correct, Your Honor,  
24 and that's -- from a personal point of view, I am  
25 convinced that -- that no investigator at the Grand

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1 Jury investigation could do that.

2 CHAIRMAN FARRAR: Okay. Thank you.

3 Go ahead, Mr. Hibey.

4 MR. HIBEY: My remarks I think will be  
5 restricted to the conduct of the Grand Jury at this  
6 point --

7 CHAIRMAN FARRAR: Right.

8 MR. HIBEY: -- because I do have other  
9 points to --

10 CHAIRMAN FARRAR: Oh, yes. No, no, we're  
11 going to get to the motion.

12 MR. HIBEY: Yes.

13 CHAIRMAN FARRAR: We're going to get to  
14 the motion, which is why we're here. So all we want  
15 to know right now from you is if you have any more on  
16 how -- on how the Grand Jury works, how the Justice  
17 Department policies work, and whether your views are  
18 to any degree divergent from those of Mr. Poole. In  
19 other words, is he in your mind and through your  
20 experience, is he accurately describing what happens?

21 And if he is accurately describing it --  
22 if he isn't, then we want to hear your view of what  
23 happens. If he is accurately describing what happens,  
24 we want to hear your view of why that shouldn't be the  
25 way things are done and whether we have any freedom to

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1 say, "No, you know, that's in excess of bureaucratic  
2 zeal," or whatever.

3 MR. HIBEY: Well, I think I've made the  
4 points I'd like to make regarding the Grand Jury, the  
5 way the Grand Jury operates or my understanding for  
6 the rationale of how the Grand Jury operates.

7 CHAIRMAN FARRAR: Do you agree --

8 MR. HIBEY: The area -- where I'm having  
9 difficulty is in the precision associated with the  
10 comments about information that is obtained outside  
11 the Grand Jury precincts by prosecutors, aided by  
12 those who are working with them, as to whether those  
13 materials are Grand Jury -- are covered by the secrecy  
14 requirements of the Grand Jury.

15 CHAIRMAN FARRAR: Okay.

16 MR. HIBEY: That gets me into what  
17 happened in our case.

18 CHAIRMAN FARRAR: I think what he's saying  
19 is that the -- what the investigator knew by August  
20 2003 is freely disclosable. However, the investigator  
21 can't separate what he knew before August 2003 from  
22 what he knew after November 2003. So when Ms. Clark  
23 asks him a question, if the Justice Department would  
24 let him answer, there would be a concern that he would  
25 be revealing material -- matters that he -- he would

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1 be revealing, even if unknowingly, matters that he  
2 learned during the Grand Jury investigation. Do you  
3 disagree that that is a --

4 MR. HIBEY: I think that's what he's  
5 saying.

6 CHAIRMAN FARRAR: Okay. Would you --

7 MR. HIBEY: I'm saying that --

8 CHAIRMAN FARRAR: -- tell me what that --

9 MR. HIBEY: I don't disagree with the  
10 generality of that principle.

11 CHAIRMAN FARRAR: Okay.

12 MR. HIBEY: Its application, on the other  
13 hand, it may be an area within which there would be  
14 disagreement. It's a fact-driven issue, and  
15 specificity is exquisite here in order to understand  
16 whether that general proposition would apply. My view  
17 is that the Justice Department has always taken the  
18 broadest view of what is protected by the Grand Jury  
19 as a method of controlling information that is amassed  
20 in connection with a prosecution. That's an  
21 observation. It is not --

22 CHAIRMAN FARRAR: Suppose we agreed with  
23 that observation as a general matter and said they  
24 have no business doing that in an interstate  
25 transportation of stolen motor vehicle case? This is

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1 not that kind of case. This is an enormously  
2 complicated case where years of investigation went in.  
3 The two proceedings are enormously difficult. The OI  
4 report is very long and complicated. Why is their  
5 practice, even if you could criticize it in other  
6 circumstances, not at least a practice that we ought  
7 to give some deference to in a case of this  
8 complexity?

9 MR. HIBEY: Because of what happened in  
10 this case.

11 CHAIRMAN FARRAR: Which is?

12 MR. HIBEY: They destroyed this man's  
13 livelihood. Now they want --

14 CHAIRMAN FARRAR: That's the ultimate  
15 outcome; that's not the process.

16 MR. HIBEY: No, it is the outcome today.  
17 This is what we live with today. Now we're playing  
18 catch-up with a process. I mean, that to me is the  
19 only reason why we're having these discussions at all.  
20 It's because the ultimate sanction has been imposed.  
21 It might ultimately be removed, or it might be  
22 continued, but as we have all recognized in prior  
23 pleadings and discussions and rulings of this Panel,  
24 it is the fact that they have taken this man's  
25 livelihood, practice, in this regulated area away from

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1 him before there has been an adjudicating --  
2 adjudication of anything.

3 That is -- that is an overarching fact  
4 that impacts all of this. It may not alter the  
5 principle that Mr. Poole has articulated, but we  
6 cannot immediately accept the application of that  
7 principle to this situation. That's why I say these  
8 are fact-driven, very fact-specific issues before you  
9 go around applying these very broad principles in the  
10 name of Grand Jury secrecy.

11 Grand Jury secrecy, by design --

12 CHAIRMAN FARRAR: I don't want to get into  
13 the motion, but you have the information. Ms. Clark  
14 doesn't have it, and we don't have it, but you have  
15 it.

16 MR. HIBEY: Yes. I'm under a protective  
17 order.

18 CHAIRMAN FARRAR: Okay. Is --

19 MR. HIBEY: So my use of it is going to be  
20 limited by the protective order, I can tell you that.

21 CHAIRMAN FARRAR: The District Court  
22 protective order?

23 MR. HIBEY: Yes. The government went  
24 in --

25 CHAIRMAN FARRAR: Tell me about the order.

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1 You can't show it --

2 MR. HIBEY: Very simply, the government  
3 came in, made an application -- they indicated --

4 CHAIRMAN FARRAR: No, first tell me what  
5 the order says. Does it say you can --

6 MR. HIBEY: I'm bound by Grand Jury  
7 secrecy is what I think it says. I can't remember it  
8 standing here right now.

9 CHAIRMAN FARRAR: Obviously, you can use  
10 it in the criminal case. That's why it's given to  
11 you. Can you use it -- your knowledge that you gained  
12 from it in this case?

13 MR. HIBEY: It's not addressed in the  
14 protective order.

15 CHAIRMAN FARRAR: Can you show it to your  
16 neighbor?

17 MR. HIBEY: No.

18 JUDGE HAWKENS: I'm not sure whether or  
19 not it's damaging to you to comply with the protective  
20 order and maybe you want to stay in this case.

21 MR. HIBEY: Oh, no, that's not my point.  
22 My point is --

23 JUDGE HAWKENS: I'm not sure what your  
24 point is.

25 MR. HIBEY: Well, I think I was simply

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1 trying to respond to the question of whether I may use  
2 the Grand Jury testimonies that have been provided to  
3 me in this case. My understanding is I may not.

4 JUDGE HAWKENS: Okay.

5 CHAIRMAN FARRAR: Why don't we do this.  
6 Since we've used so much time already, I think this is  
7 -- if my colleagues don't have any more questions, if  
8 you want to wrap this part up. Remember, this is just  
9 giving us context, so we can hear the motion itself  
10 and know where -- you know, have some grasp of this  
11 concept. So --

12 MR. HIBEY: Yes, we -- all right. I'll  
13 stand down, because I think I have more to say about  
14 how these purported principles work in this instance  
15 than --

16 CHAIRMAN FARRAR: And then we'll be happy  
17 to hear --

18 MR. HIBEY: -- having to quarrel with some  
19 of these articulations.

20 CHAIRMAN FARRAR: Mr. Poole, Mr.  
21 Ballatine, you're free to stay with us, because I'd  
22 like to say we're -- we won't have to come back to  
23 you, but that's not how we operate. We're likely to  
24 hear something where we may need you for a moment at  
25 the end.

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1 MR. POOLE: We'll stay, Your Honor.

2 CHAIRMAN FARRAR: Okay.

3 MR. POOLE: And if I may, two brief  
4 points. The -- we don't represent the United States  
5 or the Nuclear Regulatory Commission in this  
6 proceeding. We don't have a position on whether Mr.  
7 Geisen should be debarred or not. That's, I believe,  
8 the Court's job.

9 The second point I would like to make is  
10 that the harm that we've envision in -- at the outset  
11 in Mr. Ballantine's affidavit concerning the likely  
12 outcome has come to pass. Mr. Geisen has taken a --

13 CHAIRMAN FARRAR: Wait, wait, wait, wait.  
14 We heard that motion, and the Staff's motion -- the  
15 government's motion at that point was based on harm to  
16 your case, to the criminal case. Their motion today  
17 is, as I read it, based solely on harm to this  
18 proceeding. So I don't want to preclude you from  
19 saying what it has done to your case. That might be  
20 a matter for another day where the government comes  
21 back with another motion and says facts have changed  
22 in the criminal case.

23 But you've come all this way. Go ahead,  
24 but make it brief.

25 MR. POOLE: I will. I can complete in a

1 sentence.

2 CHAIRMAN FARRAR: Okay.

3 MR. POOLE: And the discovery that has  
4 occurred has been lop-sided, as to what they provided  
5 to the Staff and provided to us.

6 CHAIRMAN FARRAR: Okay. All right.

7 MR. POOLE: Do you need me to come forward,  
8 Your Honor?

9 CHAIRMAN FARRAR: Oh, no, just sit there.  
10 You've got a ring-side seat. Enjoy the rest of it,  
11 because Ms. Clark and Mr. Hibey probably will not.

12 Go ahead, Ms. Clark. We're happy to have  
13 you with us. Go ahead.

14 MS. CLARK: Good afternoon. Well, of  
15 course, our motion today requests two alternative  
16 actions by this Board. I'd like to begin by  
17 discussing our request for a motion to stay.

18 CHAIRMAN FARRAR: To stay the hearing  
19 rather than set conditions?

20 MS. CLARK: Right.

21 CHAIRMAN FARRAR: Okay.

22 MS. CLARK: Right. I'd like to speak  
23 about them separately to the extent I can.

24 CHAIRMAN FARRAR: Right.

25 MS. CLARK: I think it's somewhat

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1 confusing to talk about them together.

2 CHAIRMAN FARRAR: Right.

3 MS. CLARK: I'd like to point out the  
4 circumstances that have occurred since we previously  
5 requested a stay that we think bear significantly upon  
6 the Board's decision today. And the first, as we've  
7 discussed a little bit already, is the discovery that  
8 has occurred.

9 Since that time, the Staff has provided  
10 substantial discovery to Mr. Geisen. As you know, we  
11 provided many documents and mandatory disclosures. We  
12 have also provided substantial additional discovery in  
13 response to written interrogatories and requests for  
14 production of documents.

15 CHAIRMAN FARRAR: Page 3 of your brief  
16 says you've gotten nothing in return. Is that --

17 MS. CLARK: That is still true.

18 CHAIRMAN FARRAR: Gear up.

19 MS. CLARK: As of today, we have not  
20 received a single document. We have provided  
21 everything, notwithstanding the fact that he has told  
22 us that he will be producing documents. We have also  
23 not received any logs or any lists of documents that  
24 he claims he will not be providing to us under a claim  
25 of privilege.

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1                   Significantly, we have also been informed  
2 by him that he will have or does have significant  
3 issues with the discovery that we have provided.  
4 However, as of today, we have received virtually no  
5 description of what those issues might be.

6                   Under the circumstances, I think it's  
7 highly unlikely that we can resolve any discovery  
8 disputes before the current date of December 1st when  
9 motions to compel would be filed.

10                   CHAIRMAN FARRAR: If he -- if you're  
11 correct in characterizing his lack of response, that's  
12 going to lead to some motions from you which will take  
13 us some time to resolve. So if, in fact, that's what  
14 he has done, why that's not redounded -- not to your  
15 detriment but to his, because his client is the one  
16 who is debarred.

17                   MS. CLARK: Exactly. And --

18                   CHAIRMAN FARRAR: So what --

19                   MS. CLARK: -- in reality, this is going  
20 to prevent this expeditious hearing that he claims  
21 that he wants. The reason I point this out is because  
22 if one starts to project now the timing for this  
23 hearing, and we see that motions to compel would be  
24 filed in December, I think it's highly unlikely, maybe  
25 optimistically you might get discovery completed in,

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1 say, mid-January, and then we begin depositions.  
2 Under our --

3 CHAIRMAN FARRAR: So if we filed in the  
4 beginning of December, even if we got something out at  
5 the end of December, then you'd have to do the  
6 production --

7 MS. CLARK: Then we'd have to comply.

8 CHAIRMAN FARRAR: -- have to comply, he'd  
9 have to comply, so you're mid-January. Then, you  
10 start the 90-day --

11 MS. CLARK: The deposition process.

12 CHAIRMAN FARRAR: -- depositions, and now  
13 we're in April when the --

14 MS. CLARK: When it's all being set.

15 CHAIRMAN FARRAR: Okay. Now, why isn't  
16 that -- why isn't it a good thing that we keep going  
17 on that schedule, and by April we've completed the  
18 fact depositions and maybe we learn we don't have  
19 expert depositions. Then, the parties can all get  
20 together and decide which case they want not to go to  
21 hearing, because you obviously can't try both of them  
22 on April 17th.

23 MS. CLARK: Because of the one-sided  
24 nature of the discovery that's ongoing, which I  
25 would --

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1 CHAIRMAN FARRAR: Yes, except remember we  
2 wrote about this at some length. You started with an  
3 awful lot of -- you started with a year-long and then  
4 a four year-long investigation, so we're not really in  
5 the beginning of the argument, or the argument that  
6 it's one-sided only goes so far in a case like this  
7 where the government starts with all the advantage.

8 MS. CLARK: Well, given the circumstances  
9 now, Mr. Geisen now has all of our claims underlying  
10 our order. He has all of our evidentiary bases. If  
11 we are -- if we continue discovery, he would then, of  
12 course, request certainly more documents, more  
13 disclosures from us, and go forward with depositions.

14 At the same time, we would get nothing  
15 back from him, because he has invoked his rights under  
16 the Fifth Amendment. And we would be prejudiced in  
17 our ability to go forward with depositions.

18 CHAIRMAN FARRAR: Why don't we do this.  
19 Rather than focus on why that would entitle you to a  
20 stay where we say, okay, let's shut down this  
21 proceeding or wait for the criminal case, which may or  
22 may not go to trial in April, give a July fallback  
23 date, and so forth. Why don't the things you just  
24 said militate more strongly for conditions like I  
25 think you suggested, that by the end of written

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1 discovery Mr. Hibey tell you what his position is.

2 You have the documents. You did the huge  
3 investigation. If you -- without violating his  
4 client's Fifth Amendment right, if we said to him,  
5 "Tell the Staff what your defense is going to be, not  
6 what Mr. Hibey is going to say -- Mr. Geisen is going  
7 to say, he can say nothing, but how are you going to  
8 attack the Staff when they put on their case, what are  
9 the defense" -- isn't that what you really need? You  
10 don't need documents from him so much as you need to  
11 know -- you make a powerful case for needing to know  
12 his position. Why isn't that the answer here?

13 MS. CLARK: The difference is -- and the  
14 really significant thing here is when our  
15 administrative hearing goes forward, if our  
16 administrative hearing goes forward before the  
17 criminal trial, then he has the right to invoke the  
18 Fifth Amendment. If we wait until after the criminal  
19 proceeding, then the circumstances are entirely  
20 different.

21 CHAIRMAN FARRAR: But -- okay. I don't  
22 know why you -- I don't know why you need -- tell me  
23 why you need his testimony. You have the  
24 investigation. You have -- you have a transcript of  
25 an interview with him. You've talked to scores of

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1 other people at the plant. Presumably, somebody there  
2 put the finger on him.

3 You can call all those people except I  
4 guess Mr. Siemaszko and Mr. Cooke, and you probably --  
5 I guess you can't use their statements, because they  
6 -- you don't -- we don't worry too much about the  
7 hearsay rule in administrative proceedings, but I  
8 assume you would worry about it in that circumstance  
9 where you're dealing with eyewitness participants.

10 Why isn't the answer you don't need him?  
11 You have a case, you have his testimony, what do you  
12 need him for?

13 MS. CLARK: If Mr. Geisen does not claim  
14 -- if he goes forward in a proceeding and does not  
15 claim his Fifth Amendment privilege, which I assume  
16 would happen if we proceeded with the administrative  
17 case after the conclusion --

18 CHAIRMAN FARRAR: Right.

19 MS. CLARK: -- of the criminal trial.  
20 Then, we would want to depose Mr. Geisen and --

21 CHAIRMAN FARRAR: I didn't say what you  
22 want to do. I'm saying if -- if we tell you go ahead  
23 before the criminal case, why do you need him? I  
24 understand why you want him. But why don't you -- but  
25 if you -- if he had to tell you, "Here are the

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1 defenses I'm going to raise: I didn't work for Dave  
2 Stutze, they twisted my arm and they made me sign the  
3 report," whatever, if you had that information from  
4 him, how much would your case be hurt not to have him?  
5 In fact, you have all these people who say Geisen is  
6 the guy who is responsible, and you have him not able  
7 to rebut it.

8 Who is he going to get to rebut it? Why  
9 isn't your case stronger if he has these limitations,  
10 as long as you were told what defenses you have to --  
11 he's going to raise through other witnesses or through  
12 motions or whatever.

13 MS. CLARK: I think if he doesn't testify  
14 our case would clearly be strong as we would seek  
15 adverse inferences. And the reason that's the case is  
16 because the investigation interviews are not complete,  
17 and they are not always as clear and as precise as the  
18 information that you would seek in order to go forward  
19 with the hearing.

20 Keep in mind that these interviews were  
21 conducted during the midst of an investigation. The  
22 investigator did not have the benefit of the  
23 information from all other sources. He didn't analyze  
24 all of the evidence. And, of course, he didn't know  
25 what our claims would be in our enforcement order.

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1 CHAIRMAN FARRAR: Right. But --

2 MS. CLARK: So we are limited in -- to the  
3 extent that they don't -- they didn't ask all the  
4 questions one would want to ask in the hearing.

5 CHAIRMAN FARRAR: Except you are going to  
6 be able to depose all of these other -- I mean, here  
7 is my picture of the case. This incident happened  
8 back in 2001/2002. You did an investigation, and then  
9 the NRC said, "Hey, what's going on at Davis-Besse?"  
10 There are -- so a whole lot of workers at Davis-Besse  
11 got together and worked and filed reports. All of  
12 those people are available to you to depose, to call  
13 as witnesses, and presumably some of them are going to  
14 be of the opinion, "Gee, we were trying to be  
15 straightforward, and Mr. Geisen was not. You know, we  
16 suspected him."

17 These are all hypotheticals. You can  
18 assure your client, Mr. Hibey, we have not formed any  
19 judgment as to the facts.

20 But you presumably have all of these  
21 people who are going to say, "Yep, Geisen is the guy  
22 who did it. We were in the meeting, and we asked him  
23 the questions, and he said, 'Oh, don't worry about  
24 that,' and we later found out we should have worried."  
25 You have all of those people available. Why do you

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1 need him? The fact that he can't testify to defend  
2 himself, you've got -- I hate to use the infamous  
3 "slam dunk" words, but you've got a slam dunk.

4 MS. CLARK: Well, there is a couple of  
5 problems. Let me give you an example to show you what  
6 the issues are.

7 One of the elements of our order concerns  
8 a telephone conference that was conducted on  
9 October 3rd. We have circumstantial evidence about  
10 that telephone conference. We have a summary report  
11 that was written that listed the names of the  
12 individuals who participated in the conference, and we  
13 have handwritten notes by another person who  
14 participated in the conference that indicate that Mr.  
15 Geisen made certain statements.

16 Now, our investigators did not ask him any  
17 questions about that particular conference call. So  
18 what I would want to know is what Mr. Geisen would  
19 have to say about that conference call. So he -- for  
20 example, he could defend himself by saying, "Yes, I  
21 made that statement."

22 CHAIRMAN FARRAR: No, wait a minute.  
23 We're assuming he's going to tell us by a date certain  
24 -- I think the case is -- and they may contest this,  
25 but I -- there seems to be some agreement that the

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1 case law in the Federal Court -- it's certainly fair  
2 to say to him, "By some date certain, tell us, are you  
3 going to claim the privilege or not? If you're going  
4 to claim it, you claim it for all time. Don't be  
5 coming back the eve of the trial and saying, 'Oh, gee,  
6 I want to respond to this.'" So --

7 MS. CLARK: But that would not be the case  
8 if he -- if our proceeding went forth after the --

9 CHAIRMAN FARRAR: No, no, no. I --

10 MS. CLARK: I guess I'm --

11 CHAIRMAN FARRAR: It happened before.

12 MS. CLARK: Right.

13 CHAIRMAN FARRAR: But some time by a date  
14 certain. Let's pick January 31st as the end of  
15 written discovery, and we say, "Okay. Written  
16 discovery is over. Mr. Hibey, you have 10 days to  
17 tell us, is your client claiming the Fifth or not?  
18 And when you tell us, it's irrevocable."

19 MS. CLARK: Right.

20 CHAIRMAN FARRAR: If that's the case, and  
21 you have -- you know whose notes those are of the  
22 conference, and you can have that witness come in and  
23 say, "Yep, I was on the conference call, and Mr.  
24 Geisen said this. Then, we asked him about it, and he  
25 said that." I assume there's an exception to the

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1 hearsay rule that lets that in. And then he's stuck.

2 MS. CLARK: Yes.

3 CHAIRMAN FARRAR: Unless he can find  
4 somebody else who was on the conference. And it's not  
5 a matter of making an adverse inference that he didn't  
6 say; he's got to find somebody else who was on the  
7 conference call who says the opposite or says that the  
8 person who gets -- whose hearsay statement we just  
9 admitted is a known liar and prevaricator and has been  
10 in jail for fraud three times.

11 I mean, he's got to do something to attack  
12 that person or you win, assuming it proves the  
13 elements of the allegations. So how are you hurt --  
14 how is the Staff hurt is the case goes forward, if we  
15 give Mr. Geisen a date certain to claim the Fifth or  
16 not, and tell him he's got to tell you not what Mr.  
17 Geisen is going to say, but what the line -- just like  
18 the alibi and insanity rules, he's got to say, "Here  
19 are the defenses I'm going to raise." How does that  
20 hurt you?

21 MS. CLARK: That would be, I think, a  
22 sufficient remedy to present any potential surprise at  
23 the hearing. I do believe, however, just as a matter  
24 of public interest, that we would be going forward  
25 with a limited record in this case, because we know

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1 that certain key witnesses and particularly Mr.  
2 Siemaszko would not be able to testify here.

3 We know that we would have to seek adverse  
4 inferences. We would have to ask Mr. Geisen specific  
5 questions and seek these inferences on his failure to  
6 testify. And so for these reasons, we think that this  
7 -- the decision before this Board will necessarily be  
8 based on a limited factual record.

9 CHAIRMAN FARRAR: Okay. Let me ask you  
10 about our role, since you brought it up. One of our  
11 roles is to determine whether this order the Staff  
12 issued is -- should stand, as long as you've talked  
13 about a larger public interest role. Mr. Geisen  
14 raises in his brief the question of why, if the Staff  
15 had the OI report in August of 2003, it was three  
16 years before the Staff said to this gentlemen, "You  
17 are such a clear and present danger and an imminent  
18 threat to the good order of nuclear powerplants that  
19 you have to leave your job today." How could you wait  
20 three years to say that?

21 And if we're going to have -- if you are  
22 suggesting there's a larger public interest that we  
23 need to serve in this proceeding, rather than just the  
24 validity of this order, why do we not to have to look  
25 into that question?

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1 MS. CLARK: Well, Your Honor, first let me  
2 say that I am new -- completely new to this case as of  
3 August of this year, and I can't speak personally to  
4 why it took that long. I do know that this was a  
5 decision the Staff did not take lightly. It was very  
6 thoroughly considered.

7 CHAIRMAN FARRAR: But you got it wrong as  
8 to Mr. Miller.

9 MS. CLARK: Well, in light of new  
10 evidence.

11 CHAIRMAN FARRAR: You had four years of  
12 investigation. You never -- we did not ask in Mr.  
13 Miller's settlement what the new evidence was and why  
14 it wasn't disclosed in the four years, but you had  
15 four years on Mr. Miller and you got it wrong. You  
16 had four years on Mr. Geisen, and then you waited and  
17 Mr. Geisen says this shows the reason you waited was  
18 the close collaboration with the Department of  
19 Justice, which will not now collaborate with you.

20 So if you want to have a hearing on the  
21 public interest, then that may be a wish you wish  
22 didn't come true.

23 MS. CLARK: Well, the public interest,  
24 though, for this proceeding now before this Board is,  
25 in fact, whether the order should be sustained. And

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1 I think that the public interest is best served by  
2 getting the full evidence for the record before we  
3 make a decision on that particular issue.

4 CHAIRMAN FARRAR: But that -- suppose we  
5 agreed with you, and we say, okay, that automatically  
6 means we've got to wait until after the criminal case,  
7 because whatever Mr. Geisen does and any inferences  
8 there are, we can't get Siemaszko and Cooke until  
9 after the criminal case. But that means saying to Mr.  
10 Geisen, "Sorry about your five years, but two years is  
11 going to go by before you get to challenge it."

12 MS. CLARK: I understand. But --

13 CHAIRMAN FARRAR: Certainly, there's a  
14 public interest in rapid determinations on matters  
15 that are having an immediate and dramatic effect on a  
16 person's life.

17 MS. CLARK: That's true. And if I  
18 believed -- the problem here is that we are actually  
19 being delayed not by actions by the Staff, but, in  
20 fact, by actions by Mr. Geisen. If he, in fact, is  
21 interested in getting this hearing completed before  
22 the criminal trial, I think that he would have  
23 complied with discovery by now.

24 CHAIRMAN FARRAR: And I -- we do give you  
25 credit. We asked at the very beginning after denying

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1 the first stay, could you get the documents to him  
2 more quickly than the time allotted, and you did that.  
3 There is certainly no criticism of -- since this  
4 proceeding began, there is certainly no criticism of  
5 the Staff's performance in terms of delivering what it  
6 needed to deliver on time. As far as I can see,  
7 they've got no complaints.

8 But did I -- other than the public  
9 interest in having a full record, did I hear you  
10 almost concede that if you got what I suggested you  
11 could soldier on, you would have a declaration by Mr.  
12 Geisen that he is or is -- let's say that he is going  
13 to claim the Fifth, an irrevocable declaration,  
14 coupled with by a date certain before the depositions  
15 begin of here are going to be his lines of defense, if  
16 you got that, you'd go away and say, "We won. We  
17 didn't get our stay order, but we won," wouldn't you?

18 MS. CLARK: Yes, I believe we could go  
19 forward. And I believe we could prevail under those  
20 circumstances.

21 JUDGE HAWKENS: Ms. Clark, does the  
22 government -- and you might have to have the DOJ  
23 attorney weigh in on this, but does the government  
24 contemplate -- as far you know, are you ready to go  
25 forward with the criminal trial?

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1 MS. CLARK: Maybe I should DOJ speak to  
2 that.

3 MR. POOLE: The government will be  
4 prepared certainly to go forward with the trial on  
5 that date if that is when it's held. It is not in our  
6 control to determine the trial date. What is in  
7 control is our preparation for it.

8 JUDGE HAWKENS: All right.

9 CHAIRMAN FARRAR: Ms. Clark, you mentioned  
10 at pages 14 and 15 of your brief the collateral  
11 estoppel notion, that you're concerned that if this  
12 goes forward and Mr. Geisen were to win under  
13 conditions that were too adverse to you, you would  
14 then march into Federal District Court and say, "I  
15 won, when the government had only a modest burden of  
16 proof, so I should have collateral estoppel where the  
17 government has a much higher burden of proof."

18 I assume, however, that Department of  
19 Justice lawyers would, even when you made that motion,  
20 would not -- would not say, you know, "Yep, you're  
21 right, Mr. Geisen. There's collateral estoppel here."  
22 I assume there are several points of attack where they  
23 would say not the same issues, not a real court,  
24 whatever they say when they don't want to do that.

25 MS. CLARK: Absolutely. I did discuss

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1 this with DOJ, and it's clear we are raising it only  
2 as a --

3 CHAIRMAN FARRAR: But it would -- right.  
4 I'm sure Mr. Geisen would bring -- would file that  
5 motion, and so we can be sure that the Department of  
6 Justice would oppose.

7 MS. CLARK: Absolutely.

8 CHAIRMAN FARRAR: Okay. I think we  
9 understand your position. If you have --

10 MS. CLARK: Okay.

11 CHAIRMAN FARRAR: -- nothing else, Mr.  
12 Hibey?

13 MS. CLARK: Thank you.

14 MR. HIBEY: What we have here is a proper  
15 invocation of the privilege by Mr. Geisen, as  
16 evidenced by the fact that there is a pending criminal  
17 case. Mr. Geisen is not a claimant in this case, who  
18 at the same time that his claim is being pressed he is  
19 asking or -- or asserting his right to remain silent.

20 The Staff has had access to several of the  
21 statements that Mr. Geisen has made during the  
22 investigation of the incident. He was interviewed by  
23 the Department of Justice and the NRC, with counsel  
24 present, on February 2, 2005. That interview is not  
25 governed by the rules of secrecy of a Grand Jury.

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1 CHAIRMAN FARRAR: Did he answer all of the  
2 questions?

3 MR. HIBEY: Yes. It was several hours of  
4 interview.

5 CHAIRMAN FARRAR: Is it transcribed?

6 MR. HIBEY: Not transcribed -- the Justice  
7 Department doesn't transcribe those interviews. What  
8 they did is took ample notes. Those notes were turned  
9 over to us in the criminal discovery. There was no  
10 limitation on their use, as there could not have been  
11 because we requested them. And, therefore, there was  
12 no Grand Jury proceeding, thus hearkening back to the  
13 difficulty I had in applying the broad, general  
14 principles of confidentiality that were articulated by  
15 Mr. Poole earlier in the afternoon.

16 So what we have here is -- this is  
17 compiled in a dossier that I had put together for our  
18 own use -- one, two, three, four, five, six occasions  
19 of interview that are in the possession of the NRC of  
20 Mr. Geisen.

21 CHAIRMAN FARRAR: And you may use those if  
22 Mr. Geisen doesn't testify either here or in the  
23 criminal case, and any of the people who heard him in  
24 those interviews say what he said to the extent that  
25 it's an admission against interest.

1 MR. HIBEY: I presume that the NRC is free  
2 to attempt to put into evidence statements of Mr.  
3 Geisen that constituted admissions against interest.  
4 That's how I would respond to that. I don't know how  
5 they use these things, so --

6 CHAIRMAN FARRAR: But the way you say that  
7 it's --

8 MR. HIBEY: Oh, I'm very careful, because  
9 you said "can they," and I thought -- I took "can" to  
10 mean "may," and I'm not here to give them permission  
11 to do anything.

12 CHAIRMAN FARRAR: But if they did that,  
13 you -- you would say --

14 MR. HIBEY: I wouldn't say --

15 CHAIRMAN FARRAR: -- you wouldn't say,  
16 "Fine with us," you'd say, "Here is why you can't"  
17 or --

18 MR. HIBEY: No, here is the -- we'd deal  
19 with it, whether it's admissible or not, but what we  
20 understand is that these are statements that are -- of  
21 Mr. Geisen that are in the possession of the Staff,  
22 that the Staff in its wisdom may use, and use them not  
23 only as potential admissions against interest but use  
24 them for the intelligence value that they have to give  
25 them a sense of what Mr. Geisen has said -- I forgot

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1 how many times I've counted -- let's say five or six  
2 times at different stages over the period of the  
3 several years that the NRC has investigated this case.

4 CHAIRMAN FARRAR: Let me interrupt you one  
5 second. Ms. Clark, do you have those?

6 MS. CLARK: I'm sorry?

7 CHAIRMAN FARRAR: Do you have those  
8 statements that Mr. Hibey assumes you have?

9 MS. CLARK: I'm actually trying to  
10 ascertain what they are. As I recall, there is one  
11 transcribed interview by the Office of Investigations,  
12 and I don't know what the other five are. I suspect  
13 that none of them are probably transcribed interviews.

14 CHAIRMAN FARRAR: No, but there are notes.  
15 There are notes of the person who took them.

16 MR. POOLE: No.

17 CHAIRMAN FARRAR: She does not have them.

18 MS. CLARK: Oh, I'm sorry. The February  
19 2005, I do not have that.

20 CHAIRMAN FARRAR: All these notes. You  
21 don't have those.

22 MR. HIBEY: So what we have here is a  
23 proper invocation of the right to remain silent under  
24 the Fifth Amendment against a record in which they --  
25 the Staff -- actually or constructively has these

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1 materials, the statements purportedly made by Mr.  
2 Geisen to various individuals during the course of the  
3 -- of interviews of Mr. Geisen in the investigation.

4 CHAIRMAN FARRAR: You keep saying "a  
5 proper invocation of the privilege." As I read the  
6 case law, even if it's a proper invocation of the  
7 privilege, that privilege -- invoking that privilege  
8 in a civil case has some consequences.

9 MR. HIBEY: Yes, it does.

10 CHAIRMAN FARRAR: There can't be severe  
11 sanctions, they can't be too costly, but they can --  
12 they have some cost, and in some of the courts -- and  
13 it's not so much a cost, I think the courts are  
14 telling us, "Fine. In the circumstances, not to  
15 punish you but to make it a fair proceeding, we've got  
16 to come up with some rules."

17 One may be you draw adverse inferences.  
18 The other would be giving you a date certain to say  
19 you're either going to invoke the privilege for all  
20 time in our case or you're not going to invoke it.  
21 And, third, if you're going to invoke the privilege,  
22 you have to give the Staff some indication, not out of  
23 Mr. Geisen's mouth but out of your typewriter, here  
24 are the positions we're going to take.

25 Now, those are not invoking -- that's not

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1 punishing him for the proper invocation of the  
2 privilege. That's saying to him, "Okay. We  
3 appreciate you doing that, that's fine with us, but we  
4 have a proceeding to run, and we've got to have a fair  
5 proceeding." And we can't have the Staff go in and  
6 not know what -- what your line of defense is going to  
7 be.

8 Well, you practice criminal law. When in  
9 a criminal case, I know you have to give notice of an  
10 alibi defense. What process is used so that the  
11 prosecutor knows what your line of defense is going to  
12 be? Or does the prosecutor just go in and establish  
13 the elements of the crime and meets whatever you come  
14 up with?

15 MR. HIBEY: The latter. In the case of  
16 affirmative defenses such as alibi and insanity, there  
17 are rules in various courts, not uniform mind you, but  
18 in some courts that would require the -- a defendant  
19 to give notice of the position of that -- of those  
20 kinds of affirmative defenses. We are not pleading  
21 insanity here. We are not pleading alibi here.

22 CHAIRMAN FARRAR: Yes, except, you know,  
23 alibi --

24 MR. HIBEY: It wasn't there. We're not  
25 saying --

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1 CHAIRMAN FARRAR: But isn't it like an  
2 alibi to say, "Well, yes, I signed that document, but  
3 I asked my subordinates -- you know, I was busy that  
4 day and I asked my subordinate, 'Is everything in  
5 there true? Did you really'" -- and this is how  
6 companies work. I've been in a company. The superior  
7 asks the subordinate, "Is this the right thing? Did  
8 you check it out? Now, this is not going to get me in  
9 trouble, is it?" "No, no, boss, it's all fine."

10 That's a kind of an alibi defense, but --  
11 that he would say, "I just signed what they -- they  
12 put 100 papers in front of me that day, and I just  
13 signed it. I didn't -- I had no idea what was in it."  
14 If that were going to be your defense, would you have  
15 to tell them in advance? Who would you have to tell  
16 in a criminal case?

17 MR. HIBEY: No, Your Honor.

18 CHAIRMAN FARRAR: So then, by -- and you  
19 think in a civil case where there's more discovery and  
20 where the whole point of the civil discovery rule is  
21 so there's no surprise and everybody knows what's  
22 going to happen, you wouldn't have to give them notice  
23 of that in this proceeding?

24 MR. HIBEY: No, Your Honor, not under  
25 these circumstances.

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1 CHAIRMAN FARRAR: Tell me the  
2 circumstances.

3 MR. HIBEY: The circumstances are that the  
4 trigger has already been pulled on this man. He has  
5 not his livelihood. The sanction has been imposed.  
6 The rest of this is a catch-up. The reality is he's  
7 out of work.

8 CHAIRMAN FARRAR: Yes, but there was a  
9 provision -- there are two things. There is a  
10 provision in our rules to challenge, although the  
11 challenge is fairly limited.

12 Challenge immediate effectiveness, and Mr.  
13 Poole says that the mere fact of an indictment stands  
14 for something. In other words, I think he was trying  
15 to urge us don't get too nervous about the fact that  
16 this was immediately effective, because there was also  
17 an indictment.

18 MR. HIBEY: Well, there was an indictment,  
19 but I'm not so sure it -- well, let me simply quote  
20 from cases.

21 CHAIRMAN FARRAR: Okay.

22 MR. HIBEY: The recognition by the Supreme  
23 Court by Mr. Justice Rehnquist, that a view is held,  
24 certainly not endorsed by the Supreme Court, that the  
25 grand jury can indict a ham sandwich.

1 By that it means if the grand jury rubber-  
2 stamps whatever the government puts for before --

3 CHAIRMAN FARRAR: I thought that was the  
4 Chief Justice of the New York Court of Appeals, who  
5 later went to jail for something.

6 MR. HIBEY: He might have done it too, but  
7 his interests were more clearly identified. I believe  
8 it came out of something that Mr. Justice Rehnquist  
9 had once said. But it was a common statement.

10 Secondly, what if you have the  
11 circumstance where all of the witnesses appear before  
12 grand jury number one, but grand jury number two does  
13 the indicting?

14 Do you think that under those  
15 circumstances we have here that situation in which the  
16 grand jury has acted on its own, well-informed basis?

17 CHAIRMAN FARRAR: Did that happen here?

18 MR. HIBEY: I believe it did.

19 CHAIRMAN FARRAR: No one's ever mentioned  
20 that to us.

21 MR. HIBEY: No one's ever said it until  
22 now. That's our belief. So I don't take great  
23 deference --

24 CHAIRMAN FARRAR: I can't remember. Is an  
25 indictment signed by the grand jurors or only by the

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1 foreman?

2 MR. HIBEY: Oh, it's voted upon by the  
3 grand jury after presumably the allegations.

4 CHAIRMAN FARRAR: No, no. But when the  
5 district judge gets an indictment, does it have the  
6 names of the grand jurors on it?

7 MR. HIBEY: No. It has the name of the  
8 foreman, foreperson, forgive me, as the signatory.  
9 But when, at least in our district, when the grand  
10 jury --

11 When the indictment is handed up, all of  
12 the grand jurors are in the well of the court when the  
13 indictment is handed up to the trial judge, to the  
14 chief judge, the administrative judge, to receive it  
15 as a charge to be -- to hail a man into court to be  
16 accountable and presumably --

17 CHAIRMAN FARRAR: And at that point, the  
18 district judge, if I recall correctly, has no idea  
19 what the grand jury considered or didn't consider.

20 MR. HIBEY: That's correct. I mean what  
21 he has, he has no idea what they did, other than to  
22 vote up a document that will move forward in the  
23 process.

24 So I mean, is there deference to be given  
25 to the fact that the grand jury returned an

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1 indictment? Yes. But the devil is always in the  
2 details of these things.

3 So when -- and so you have to understand  
4 what we're dealing with as defendants. What we're  
5 dealing with as defendants is a true bill of  
6 indictment returned by a grand jury. Now we're going  
7 to investigate it and we're going to make our motions  
8 and we're going to defend it.

9 But the fact of the matter is the man is  
10 in jeopardy of the criminal law. Now add to that this  
11 circumstance, which is not, as existed in a number of  
12 the cases that have been cited in the briefs, a  
13 situation where an enforcement action is merely being  
14 brought against somebody, seeking an injunction of  
15 some sort.

16 This is a situation where, as we all know  
17 and I don't want to get emotional about this, but his  
18 livelihood has been taken away from him. The ultimate  
19 sanction has been imposed, and from that, we are  
20 expected to go forward and defend the pending criminal  
21 case in --

22 CHAIRMAN FARRAR: Well, if that's all  
23 true, why aren't we going a lot faster? We said when  
24 we denied that first stay motion, that this is an  
25 important right you have. The Commission's

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1 regulations say you're entitled to an expedited.

2 In every prehearing conference call we've  
3 had in any of the three companion cases, when there  
4 needed to be more time, we've said to the subject of  
5 the enforcement order, you know, it's your -- in  
6 effect, it's your nickel.

7 You're the one who's being hurt by any  
8 delay. If you're happy with delay that seems  
9 reasonable to us, you're going to get the delay. Why  
10 aren't you in here pushing us? We're, you know, we're  
11 ready to go to hearing. We're waiting for this case.  
12 Why are we not moving faster?

13 MR. HIBEY: If you're ready to go in  
14 January, we will be ready to go in January.

15 CHAIRMAN FARRAR: What about the -- we  
16 haven't taken depositions yet?

17 MR. HIBEY: Well, there may be one or two  
18 that we'll take.

19 CHAIRMAN FARRAR: Then we don't need 90  
20 days for depositions? What do you do with the basic  
21 *Hickman v. Taylor* rule, which I assume is applicable  
22 here, that both sides are entitled to know --

23 You know, your guy doesn't have to  
24 testify. You know, there's no -- you're absolutely  
25 correct. This is a proper invocation of the

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1 privilege.

2 But the other side in any case, you and  
3 the staff, any litigant in any case is entitled to  
4 know what the other side, how they're going to  
5 approach the trial. Why doesn't the staff have to  
6 know that?

7 MR. HIBEY: Because the Fifth Amendment  
8 protects us from having to disclose that in its  
9 entirety.

10 CHAIRMAN FARRAR: No, no. Then you're  
11 going to need to tell me about that, because I thought  
12 the Fifth Amendment protected your client from ever  
13 having to say anything in any forum whatsoever that  
14 could come back to haunt him in the criminal case.

15 I didn't know that it -- we didn't find  
16 any cases where it relieved the criminal defendant  
17 from having to tell his opponent in a civil case what  
18 the approach was going to be. The defendant doesn't  
19 say it; you say it.

20 You send the staff some documents and say  
21 here's our -- you know, we could ask for a pretrial  
22 brief. A lot of civil cases you ask for a pretrial  
23 brief.

24 We don't necessarily want to impose that  
25 burden on you, but we could say that "Okay, we're

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1 going to trial in January.

2 By December 15<sup>th</sup>, both sides give us a  
3 pretrial brief which says where you're going to and  
4 what you'd like our ultimate findings of fact to be."  
5 You'd have to give us that, wouldn't you, or would  
6 you?

7 MR. HIBEY: If you're asking for a  
8 pretrial brief on what the findings of fact should be?

9 CHAIRMAN FARRAR: Yes.

10 MR. HIBEY: Is that what you're asking?

11 CHAIRMAN FARRAR: Yes. Wouldn't we have  
12 to -- well, pretrial briefs say here's who we're going  
13 to put on the stand. It won't be Mr. Geisen. But  
14 here's who we're going to put on the stand. Here's  
15 our experts, if there are any.

16 Here's our overall -- we asked for this in  
17 the prior fuel storage cases, which is one I spent a  
18 lot of time on. What is the theory of your case? How  
19 does each witness support that theory of the case, and  
20 what are your ultimate findings?

21 If you have to -- well, do you agree you  
22 would have to give us that if we asked for it, without  
23 damaging the invocation of the Fifth Amendment  
24 privilege by the --

25 MR. HIBEY: Well, we would have to be

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1 responsive within the constraints imposed upon us by  
2 our invocation of the Fifth Amendment.

3 CHAIRMAN FARRAR: How does that implicate  
4 the Fifth Amendment? We're not asking you what your  
5 client says; we're asking what you're going to present  
6 to us, so we can get ready for the case, and so your  
7 opponent can get ready for the case, and they have to  
8 give you the same thing about their case. Isn't that  
9 how civil proceedings work?

10 MR. HIBEY: Yes, that's how civil  
11 proceedings work. However, with the heavy layering of  
12 the Fifth Amendment, there may be less disclosure than  
13 the parties are normally accustomed to in a civil  
14 proceeding.

15 CHAIRMAN FARRAR: Okay. Ms. Clark said  
16 you haven't given them a single document. Is that  
17 true?

18 MR. HIBEY: I believe that's true.

19 CHAIRMAN FARRAR: If you had to give them  
20 some sort of pretrial brief, why wouldn't it be less  
21 burdensome on you to give them one single sheet of  
22 paper that says here's our approach to the case?  
23 Here's what we're going to try to establish. Not  
24 through Mr. Geisen's mouth, but through cross-  
25 examination, through other stuff?

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1 MR. HIBEY: Well, I think that's where the  
2 confrontational aspects of the case may be -- may come  
3 into play here. We would be required to address  
4 whatever the elements are of a pretrial brief, that  
5 are dictated to us by the panel.

6 To the extent that we would say what we  
7 expect will occur, or whether we have to prove  
8 anything, and thereby lay out what it is we expect to  
9 prove, depends upon what the requirements are of the  
10 pretrial brief.

11 This is going to be a cross examination  
12 case. We don't believe they can make their burden of  
13 proof. We don't think the evidence is there, that  
14 this man lied and misled the NRC.

15 CHAIRMAN FARRAR: If you were going to  
16 call -- if it was more than a cross examination case,  
17 if you were going to call any witnesses --

18 MR. HIBEY: We would identify those  
19 witnesses.

20 CHAIRMAN FARRAR: You have to identify  
21 them.

22 MR. HIBEY: We would identify them.

23 CHAIRMAN FARRAR: And they can go talk to  
24 them or depose them in advance?

25 MR. HIBEY: We cannot prevent that. We

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1 cannot prevent that.

2 CHAIRMAN FARRAR: What's the chances?  
3 Suppose we were to indicate today or at some future  
4 time that we were not going to grant the staff's  
5 request for a stay.

6 But recognizing what your client's  
7 invocation of the Fifth Amendment privilege so far, we  
8 were going to require you and the staff to work out  
9 the terms of pretrial conditions that would identify  
10 the outlines of each other's case, so we could get on  
11 with this. Is that something we should have you and  
12 Ms. Clark sit down and attempt to do, or are you so  
13 far apart that you'd rather we just do it?

14 MR. HIBEY: I don't know that that --

15 CHAIRMAN FARRAR: Or you could tell me we  
16 don't have the power to do that. Tell me, because I'm  
17 really struggling with where we go from here.

18 MR. HIBEY: Well, I think the problem is  
19 this, that more is being sought now for clarification  
20 by the panel than the panel needs to accomplish, as  
21 follows. This motion came on as a motion to abate the  
22 proceedings.

23 CHAIRMAN FARRAR: But it had an  
24 alternative.

25 MR. HIBEY: It took the issue of the Fifth

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1 Amendment, and it's taken the issue of preclusion, and  
2 it has teed them up for the Court's consideration.  
3 Then the Court asked for the short course on how the  
4 grand jury operates.

5 CHAIRMAN FARRAR: Because one of the staff  
6 points seemed to us not consistent with what our vague  
7 understanding of grand jury rules would be, if we were  
8 writing them.

9 So that's why we -- and it wouldn't have  
10 helped us to ask the staff, because I assume they have  
11 no more experience in that than we do, and we assumed  
12 you and the Department of Justice lawyers were the  
13 people that have addressed this, because you're the  
14 most experienced people in the room on the criminal  
15 cases.

16 So that was an effort to try to understand  
17 what we're dealing with here. Then I think it was  
18 beneficial. Now we're back to the motion. You've  
19 already said you don't like the first part of the  
20 staff's motion for a stay.

21 Well, you're not supposed to read anything  
22 into our questions, but at least one of us doesn't  
23 think much of it either. But the second part of the  
24 motion seems to fit right in with what's been the rule  
25 since the Federal Rules of Civil Procedure and *Hickman*

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1 v. Taylor. Each side needs to know what the other  
2 side's doing.

3 So tell me why that's not what we should  
4 do here?

5 MR. HIBEY: Because I'm not quarreling  
6 with the notion that each side should generally  
7 understand what the other side is doing. Again, the  
8 devil is in the details.

9 That's why when you take a look at the  
10 preclusion cases, you see a range there that we need  
11 to be sensitive to, as we apply it to the peculiar  
12 circumstances of this case.

13 They, take for example at one end of the  
14 spectrum, cite this case *Symaticolor* by the notorious  
15 Judge Edelstein, who simply says we're going -- the  
16 man took the Fifth. We're precluding. You've got ten  
17 days before a certain date to let people know.

18 Whereas at the other end of the spectrum,  
19 there is a sensitivity exhibited by the Court in  
20 analyzing the specific facts of the case.

21 CHAIRMAN FARRAR: How would you be heard  
22 if we adopted the Second Circuit's reasoning in the  
23 Fifth Avenue property case, which says we should seek  
24 out the ways that further the goal of permitting as  
25 much testimony as possible to be presented in civil

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1 litigation, meaning don't impose dreadful sanctions on  
2 you, despite the assertion of the privilege.

3 Also, if there's a timely request made, we  
4 should explore all possible measures in order to  
5 select that means which strikes a fair balance and  
6 accommodates both parties. Why is that not  
7 extraordinarily simple and just what we should do?

8 MR. HIBEY: Well, that's a wonderful  
9 aspirational statement by the Second Circuit. Who's  
10 going to quarrel with that? No one.

11 CHAIRMAN FARRAR: It sounds to me like the  
12 last ten minutes you've been quarreling with it.

13 MR. HIBEY: No. I am simply trying to get  
14 in the weeds here with the facts of this case, to  
15 demonstrate that that balance, that fair balance that  
16 you're trying to strike needs to be sensitive to the  
17 situation in which we find ourselves.

18 That's why I keep harkening back to the  
19 proper invocation of the Fifth Amendment as a point of  
20 departure here.

21 CHAIRMAN FARRAR: Okay, here *Pertz* (ph).  
22 If you don't like the Second Circuit take the Third,  
23 because the privilege is constitutionally-based, and  
24 we're not questioning your guy's right to do this. He  
25 may be smart to do it.

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1           The detriment to the party asserting it  
2           should be no more than is necessary to prevent unfair  
3           and unnecessary prejudice to the other side.

4           We're not talking sanctions; we're not  
5           talking inferences; we're not talking precluding you  
6           from putting on testimony. But if you're going to put  
7           on testimony, you've got to tell the staff it's  
8           coming.

9           MR. HIBEY: The testimony of whom?

10          CHAIRMAN FARRAR: Anybody but Mr. Geisen.

11          MR. HIBEY: We're there.

12          CHAIRMAN FARRAR: Then why are we here?  
13          Why are we still arguing it?

14          MR. HIBEY: Because they moved to abate.

15          CHAIRMAN FARRAR: No, no, no. They moved  
16          to abate and I got Ms. Clark to concede that yes,  
17          okay. She's rather win the first part of the motion,  
18          but she'll be happy with the second.

19          So I said to you why don't you and Ms.  
20          Clark, if we're all in agreement here that the Second  
21          and Third Circuit make sense, why don't you and Ms.  
22          Clark sit down, work out the details of what the  
23          ground rules ought to be, and we'll go to trial?

24          MR. HIBEY: Because I was hailed into  
25          court on a motion to abate.

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1 CHAIRMAN FARRAR: It was an alternative  
2 motion.

3 MR. HIBEY: The preclusion -- Your Honor,  
4 the preclusiveness is premature. That's the point.  
5 I've been trying to get across. It's too soon to be  
6 doing that.

7 We should be doing what you're suggesting  
8 before you have to answer the question of whether this  
9 panel has to come in and somehow right a balance that  
10 never has been achieved, after interaction between the  
11 parties.

12 CHAIRMAN FARRAR: Okay. As I put together  
13 all the cases and try to come up with some fair way of  
14 doing things, the first step seems to be give you a  
15 date certain by which you have to say my guy's going  
16 to permanently and irrevocably claim his privilege or  
17 he's not.

18 Somebody suggested that the date for that  
19 ought to be the end of written discovery, which looks  
20 like it may come sooner rather than later, if no one's  
21 going to appeal the motion to compel thing. So that  
22 would be Step 1.

23 But why wouldn't we say we're going to  
24 give you that date, and so you will be fully informed  
25 when you claim or don't claim the privilege, say that

1 if you claim the privilege, Step 2 is going to be you  
2 and Ms. Clark are going to negotiate.

3 Or we're going to order a set of  
4 conditions that will say how you alert each other and  
5 us as to how the case is going to proceed, and we're  
6 not going to preclude you from presenting any  
7 testimony, other than Mr. Geisen, as long as you tell  
8 the staff what it is.

9 You two sit down and in five minutes work  
10 out what those conditions should be. That's Step 2.

11 Then we have depositions. You say there's  
12 only going to be a couple, and then we decide we don't  
13 need to have expert depositions, and then we go to  
14 trial and we're done before April 17<sup>th</sup>, and there's no  
15 conflict with the other case, and your guy gets a  
16 quick hearing. Why is that not the simple solution?

17 MR. HIBEY: I see it as an approach, yes.  
18 I don't think --

19 CHAIRMAN FARRAR: If you don't like it,  
20 tell us --

21 MR. HIBEY: No, no.

22 ADMIN. JUDGE HAWKINS: Again, I asked  
23 that, what Judge Ferrar asked. Why didn't you then  
24 concede to the alternative request in the NRC's  
25 motion, which is precisely what Judge Farr just

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1 suggested?

2 MR. HIBEY: I don't read it that way. I'm  
3 sorry. I never concede that that was the approach,  
4 and to the extent -- to the extent that -- and the  
5 reason why I said I see that as an approach as opposed  
6 to a solution is because to the extent that there is  
7 ultimately a decision to preclude us from testifying  
8 at all, it is something that I think needs to be  
9 addressed much closer to the hearing date than now.

10 Because I'll stand here and argue today  
11 that we should not be precluded from changing our  
12 minds at the last minute. Now I'm saying that,  
13 realizing that that could really upset the balance  
14 around here, and the sensitivity of the Court.

15 CHAIRMAN FARRAR: Well, wait a minute. No  
16 Court has ever -- at least no decision I've read so  
17 far, has said it's a great thing to let you change  
18 your mind at the last second. They've said what is  
19 too late and what are the sanctions.

20 But no decision has said you can change  
21 your mind at the last second. Now Ms. Clark has said  
22 do it after written discovery, and she's given a  
23 reason for doing it after written discovery, which is  
24 when she goes into depositions, what's the sense of  
25 deposing people if you don't know why you're deposing

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1 them?

2 So if you don't like her suggestion for at  
3 the end of written discovery tell me why it's wrong  
4 and give me a date other than the day before the  
5 hearing, when you have to tell us if you're going to  
6 claim the privilege.

7 MR. HIBEY: It's because I see no basis  
8 for any preclusion here, in light of the ton of  
9 information they have regarding the statements of Mr.  
10 Geisen already.

11 If that is true, then the sensitivity to  
12 the invocation of the privilege and the consequences  
13 of that assertion, and the deference and special  
14 consideration to the party asserting the privilege, as  
15 discussed in that Third Circuit case, requires the  
16 most sensitive calculation closer to the hearing date  
17 than now.

18 CHAIRMAN FARRAR: We're trying to be  
19 sensitive. We're trying to get to it, but we're not  
20 going to do it the day before the hearing. The staff  
21 -- not because we like the staff and sometimes they'd  
22 say we don't like them. They've lost all the motions  
23 so far. You're way ahead.

24 But they're entitled to know at some  
25 reasonable point, like any civil litigant -- not

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1 because they're the staff -- like any civil litigant,  
2 here's the way the case is going.

3 MR. HIBEY: Your Honor, we'll abide by  
4 those rulings. I'll give you my position. It appears  
5 --

6 CHAIRMAN FARRAR: I want to know when.  
7 She says the end of written discovery. When do you  
8 say, and don't say the day before the hearing?

9 MR. HIBEY: Well, I suppose ten days  
10 before the hearing. Then we'll know.

11 ADMIN. JUDGE HAWKINS: I'm sorry. Ten  
12 days before --

13 MR. HIBEY: The hearing.

14 ADMIN. JUDGE HAWKINS: So they'll be  
15 conducting their depositions in the dark, not knowing  
16 what your claims, what your possible defenses are?

17 MR. HIBEY: These people are not in the  
18 dark. All they have to do is read what's in their --  
19 these are their witnesses. This is their evidence.

20 I mean after all, they talk about a  
21 limited factual record. I find that a nearly  
22 scandalous statement, in view of the fact that on that  
23 limited factual record, four or five years after the  
24 event, during which time this man worked in a nuclear  
25 regulatory facility without incident, they decide all

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1 of a sudden the public safety is a threat.

2 ADMIN. JUDGE HAWKINS: They're not in the  
3 dark, and I agree. But we need to go for a very one-  
4 sided reciprocity or mutuality in the discovery  
5 process, which is normally to be expected in these  
6 proceedings. So they're not going to know what their  
7 defenses are, what your claims are.

8 You said they'd know who your witnesses  
9 are. At what time are you going to let them know  
10 that?

11 MR. HIBEY: Whenever we're required to do  
12 that.

13 ADMIN. JUDGE HAWKINS: Oh, okay.

14 CHAIRMAN FARRAR: He, like me, wants an  
15 answer, when? Now, when written discovery's over?  
16 When? We're asking you to help us do the fair thing.  
17 So you saying back to us well, whenever we feel like  
18 it, that's not helpful.

19 Ms. Clark, maybe she's right, maybe she's  
20 wrong. But she says at the end of written discovery,  
21 that makes sense. Okay, you don't like that. Tell us  
22 what makes sense, because we haven't had one of these  
23 cases before.

24 Most of the case we have are about expert  
25 predictions of future performance and everything is

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1 done in writing at a time and so forth. This case is  
2 unique. We want to get on with it. We want to get on  
3 with it fairly, and if your client was wronged, as you  
4 think he was, we will say that.

5 If your client, if the staff was right,  
6 we'll say that. In that sense, we don't care. We  
7 care deeply about performing our responsibilities  
8 properly, but we don't care who wins. The person who  
9 should win is going to win, as far as we're concerned.

10 But we've got -- this is a civil  
11 proceeding. It's not a criminal proceeding, and most  
12 times, when judges say to the parties, okay how -- you  
13 know, one thing I have been in is a lot of prehearing  
14 conferences in civil cases.

15 The judge says "Okay, what are we going to  
16 do here? How are we moving ahead?" Parties say, they  
17 throw ideas on the table and an hour later you have a  
18 prehearing order that says here's how we're marching  
19 ahead.

20 We've given you a lot of time, and you  
21 haven't told us how to march ahead. So if you don't  
22 tell us how to march ahead, we'll march ahead the way  
23 Ms. Clark tells us. So do you want to counter her  
24 something with something, or do you want to counter  
25 her something with nothing?

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1 MR. HIBEY: Will you indulge me a moment?

2 CHAIRMAN FARRAR: Certainly.

3 MR. HIBEY: I thank you.

4 (Pause.)

5 MR. HIBEY: If I had five minutes, I think  
6 I could be succinct, cogent and principled in what I  
7 have to say in response to your question.

8 CHAIRMAN FARRAR: Five minutes more to  
9 consult or five --

10 MR. HIBEY: Yes. Just five minutes, for  
11 me to be able to get my --

12 CHAIRMAN FARRAR: We've been at it almost  
13 two hours. Why don't we take -- I've got 22 after.  
14 Why don't we come back at 25 of.

15 MR. HIBEY: Oh, that's more than I need.

16 CHAIRMAN FARRAR: No. Everyone can take  
17 a break and come back at 25 of.

18 MR. HIBEY: Thank you, Your Honor.

19 CHAIRMAN FARRAR: Good. Thank you.

20 MR. POOLE: Thank you, Your Honor.

21 (Whereupon, a short recess was taken.)

22 CHAIRMAN FARRAR: Thank you. Be seated.  
23 Mr. Hibey, we're back on the record after a short  
24 recess.

25 MR. HIBEY: I appreciate your indulgence,

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1 Your Honor. I hope this will help us move forward  
2 with the issues of concern to everyone.

3 May I propose that on December 15<sup>th</sup>, the  
4 parties identify potential witnesses who might be  
5 called. We would not be restricted from later  
6 identifying others, and you will see the reason for  
7 that by the next date I propose, which is the  
8 commencement of depositions on January 5<sup>th</sup> of '07.

9 January 25<sup>th</sup>, depositions discovery  
10 closes. February 10<sup>th</sup>, the parties will file pretrial  
11 submissions, with the following elements: description  
12 of contentions, identification of trial exhibits,  
13 identification of witnesses who will be called in the  
14 case-in-chief. I would amend that to say who may be  
15 called in the case-in-chief.

16 It would not include the identification of  
17 witnesses for impeachment or rebuttal purposes. Since  
18 we expected to continue with the assertion of the  
19 Fifth Amendment, there is no need to set forth a drop  
20 dead date for the continued affirmation of that.

21 If it is determined that somehow -- now  
22 with the pendency of the criminal case at this point,  
23 I think I'll stand on that proposition.

24 CHAIRMAN FARRAR: Oh no. Let's keep  
25 going. If you determine, you say you expect to

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1 continue with the assertion of the Fifth Amendment  
2 privilege, so we don't have to have a drop dead date?

3 MR. HIBEY: That's right.

4 CHAIRMAN FARRAR: But suppose you show up  
5 some day, in writing or in person, and say that  
6 expectation is not fulfilled. I changed my mind.  
7 What do we do then?

8 MR. HIBEY: I think that whatever those  
9 circumstances are would dictate what action the panel  
10 feels it needed to take, consistent with the case law  
11 and the principle of the cost associated with this  
12 movement on the part of Mr. Geisen.

13 CHAIRMAN FARRAR: Okay. You've got to  
14 find me a case from some reputable tribunal, that says  
15 you can do that, because all the ones I read said you  
16 can't do that.

17 MR. HIBEY: No. It's in the briefs.  
18 There was a case where the Court said that --

19 CHAIRMAN FARRAR: I mean it seems to me  
20 that if at whatever the last minute means, you say "I  
21 changed my mind," at the very least we'd have to say  
22 thank you. You're allowed to change your mind. Let's  
23 go back to December 15<sup>th</sup>, or in fact let's go back to  
24 the written discovery, and start again.

25 The staff would groan and say "Well, there

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1 was a lot of work wasted." But your guy would groan  
2 and say there's six months more, and I don't have my  
3 livelihood. So if this is what you want to do, I  
4 can't speak for my colleagues now.

5 But if you change your mind, no, no. The  
6 only panel -- well, staff can speak for themselves.  
7 But certainly there's not a penalty. There is a  
8 fairness component that says let's go back and we'll  
9 redo all these steps.

10 MR. HIBEY: No, no. I will stand on the  
11 proposition that we expect to continue with the  
12 assertion of the Fifth Amendment.

13 CHAIRMAN FARRAR: But before you say that,  
14 you have to understand the consequences of saying  
15 that.

16 MR. HIBEY: And we understand.

17 CHAIRMAN FARRAR: If you're not going to  
18 give us a drop dead date, we're telling you -- now I  
19 can't speak for how my colleagues are going to vote.  
20 I sometimes can't speak for how I'm going to vote.

21 But we are going to very likely say at  
22 that point thank you for letting us know, all bets  
23 are off, see you in six months. Go back and redo the  
24 written discovery.

25 MR. HIBEY: We understand that.

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1 CHAIRMAN FARRAR: Okay.

2 MR. HIBEY: Now this is all predicated on  
3 the understanding that we will get our trial in that  
4 time frame. We didn't identify the trial date to be -  
5 - we want a trial right after this.

6 CHAIRMAN FARRAR: Yes.

7 MR. HIBEY: I mean you get your pretrial  
8 submission and we go.

9 CHAIRMAN FARRAR: Right. Now we have to  
10 hear from the staff on this, but I don't know that we  
11 can pick a date now, because we have a lot of other  
12 cases that were all on different boards.

13 But we could know within a period of two  
14 weeks, you know, that it's going to be -- what's your  
15 last date, February 10<sup>th</sup>? We could say it's going to  
16 start, you know, before the end of February or no  
17 later than the first week in March.

18 MR. HIBEY: Well, the problem is that  
19 we'll be backing into possible conflicting dates. I  
20 would suggest right after this last filing, the  
21 parties would be presumably prepared to go forward.

22 CHAIRMAN FARRAR: How long a trial are we  
23 talking about?

24 MR. HIBEY: You have to ask them first.

25 CHAIRMAN FARRAR: Okay, I'll ask them.

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1 Okay. So this is basically your proposal?

2 MR. HIBEY: Yes.

3 CHAIRMAN FARRAR: It could prove very  
4 helpful. I appreciate you taking the time to --

5 MR. HIBEY: Thank you for giving us the  
6 time.

7 CHAIRMAN FARRAR: No, it's important. Ms.  
8 Clark, you can address any of the rebuttal of any  
9 arguments Mr. Hibey made, or since you've probably  
10 discerned the way we're headed, you can speak to this  
11 latest proposal or whatever you want to do.

12 MS. CLARK: Thank you. I think I'd like  
13 to begin just by responding to some of the statements  
14 that Mr. Hibey made, and in particular with regard to  
15 our access to information.

16 He's discussed quite a bit this interview  
17 with Mr. Geisen in February of 2005. We have not  
18 received any information regarding that interview. I  
19 have been assured by the Department of Justice that we  
20 will not be getting any information regarding that.

21 CHAIRMAN FARRAR: Is that correct, Mr.  
22 Poole?

23 MR. POOLE: That's correct, Your Honor.

24 CHAIRMAN FARRAR: Okay, thank you, and  
25 it's because it's viewed as incident to the grand jury

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1 process.

2 MR. POOLE: Yes. It was long after the  
3 beginning of the grand jury process and the questions  
4 that were asked at the interview were based on  
5 information gathered in the grand jury.

6 ADMIN. JUDGE TRIKOUROS: Excuse me. Does  
7 that include all six of the investigation documents  
8 that we were talking about early in this hearing?

9 MS. CLARK: You know, I'm not sure what  
10 interview reports he's discussing. What I do know,  
11 from my recollection, is I believe there is one  
12 transcribed interview that was conducted by our OI  
13 investigators. There were other statements that were  
14 not --

15 CHAIRMAN FARRAR: And you have that?

16 MS. CLARK: We do have that, and I believe  
17 there are other statements, but they are not  
18 transcribed interviews. They are statements that Mr.  
19 Geisen told me, and then it's sort of a description of  
20 what he said.

21 So you don't have the specifics of what  
22 happened. The OI interview was conducted in the midst  
23 of the investigation, looking at the actual interview  
24 itself. It's not complete.

25 In fact, the investigators did not ask any

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1 questions about two of the submittals that we cite in  
2 our order. The questions with regard to other things  
3 are not necessarily complete.

4 Many times, Mr. Geisen in his answers, for  
5 example, refers to "we." We looked at videos. We  
6 considered how to respond.

7 There is a lot of information that if one  
8 were going forward in a hearing and one had him on the  
9 witness stand, and one were deposing him that you  
10 would ask, that you can't under the circumstances.

11 ADMIN. JUDGE TRIKOUROS: Are you referring  
12 to the transcribed document?

13 MS. CLARK: Yes. I'm referring to the  
14 transcribed document.

15 ADMIN. JUDGE TRIKOUROS: I'm asking about  
16 the five additional investigator notes or sets of  
17 notes that Mr. Hibey was referring to early in this  
18 hearing. My understanding is that you do not have  
19 those, and that you will not have those?

20 MS. CLARK: The ones we do not have are  
21 anything with regard to the February 2000 interview,  
22 2005 interview that was conducted with the Department  
23 of Justice. We have nothing with regard to that.

24 ADMIN. JUDGE TRIKOUROS: That's one  
25 interview?

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1 MS. CLARK: That's one. Now the other  
2 items that he's referring to are probably -- I'm not  
3 certain, but I know there are statements that, for  
4 example, I believe there is a person who wrote a  
5 statement saying, you know, I talked to Mr. Geisen on  
6 such and such a date, and this is what I told him.

7 That's all that's in there. So in other  
8 words, it's not actually any kind of transcribed  
9 interview with Mr. Geisen. It's somebody's  
10 recollection about what they talked about, that they  
11 then subsequently wrote down.

12 So it is of limited value in terms of  
13 trying to ascertain facts based on that. Importantly,  
14 of course, none of those interviews contained any of  
15 Mr. Geisen's defenses, claims or contentions with  
16 regard to any of the elements of our order.

17 So we don't in fact have that information  
18 that Mr. Hibey is referring to, and this notion that  
19 we have constructive possession of information really  
20 is one that I can't really imagine what that means,  
21 but we just don't have it.

22 If the DOJ doesn't give it to us, we defer  
23 to them. They make these judgments as to what we can  
24 and cannot get, and we simply don't have that  
25 information.

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1 CHAIRMAN FARRAR: But if you really wanted  
2 to get it, you could go to the Chairman of the  
3 Commission who is your managerial boss, and ask him to  
4 call the Assistant Attorney General for Lands and  
5 Natural Resources or Criminal Division, and cite the  
6 memorandum of understanding and say we'd like to have  
7 it.

8 That's not a matter for us to do, like the  
9 Supreme Court won't referee a dispute between the  
10 Department of Commerce and the Department of Labor.  
11 That's not our dispute, but you have a memorandum of  
12 understanding signed by some high level people.

13 So if you want to get that, if you badly  
14 enough want to get it, you can try to get it by  
15 whatever procedures exist under the memorandum of  
16 understanding.

17 MS. CLARK: We could perhaps go through  
18 higher channels, but ultimately I believe the decision  
19 would rest with the Department of Justice.

20 Let's see. Mr. Hibey, I have to also just  
21 respond to his statement that these are our witnesses.  
22 I'm not sure how he meant that, but these are people  
23 who are subject to other orders by us. They are not  
24 assisting us in any way.

25 In fact, our interviews with them are, if

1 anything, not cooperative but investigatory in nature.  
2 So these are not our witnesses, and we don't have any  
3 special knowledge from them, just as we don't have  
4 constructive information from the DOJ.

5 CHAIRMAN FARRAR: But the OI report  
6 indicates your people talked to them, and know at  
7 least what they said. I don't know how cooperative  
8 they were, but they got something from them.

9 MS. CLARK: We got something from them,  
10 correct.

11 CHAIRMAN FARRAR: And if you think there's  
12 more lurking there, you can call them. You can depose  
13 them and/or call them as witnesses.

14 MS. CLARK: Correct.

15 CHAIRMAN FARRAR: That brings me to the --  
16 again to discovery, and where we are right now. Mr.  
17 Hibey has presented that he need only do, I think, one  
18 or two depositions. Of course, he probably knows what  
19 depositions he needs because he has all of our claims,  
20 all of our evidence.

21 We still have nothing. So we have no idea  
22 at this point in time how many depositions we would  
23 need, and who we would need to depose. It's critical  
24 that we get that information before we proceed with  
25 depositions.

1 He suggests in his response to our motion  
2 that we should be able to --

3 CHAIRMAN FARRAR: I missed that. Say that  
4 again. It's critical you get what?

5 MS. CLARK: That we get the information  
6 regarding the discovery so we won't be surprised at  
7 the hearing. We need to know who we need to depose and  
8 what questions we need to ask.

9 We need to know the potential defense that  
10 he may raise, so that we won't be surprised at  
11 hearing. We are talking about a lot of depositions.  
12 He's talking about -- okay.

13 But certainly we couldn't finish  
14 depositions in 20 days if we're required to somehow  
15 anticipate all his potential defenses and claims, and  
16 prepare to defend against them in hearing.

17 Just in closing again --

18 CHAIRMAN FARRAR: Okay. So your  
19 counterproposal is

20 MS. CLARK: That we --

21 CHAIRMAN FARRAR: Okay. We're going to  
22 finish written discovery.

23 MS. CLARK: Yes.

24 CHAIRMAN FARRAR: You're going to file  
25 some motions. We'll get that all wrapped up. So

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1 written discovery is over. He says don't make him do  
2 anything then about the privilege.

3 Can you live with that, with our caveat  
4 that if he later changes his mind, we go all the way  
5 back to the beginning of written discovery and redo  
6 everything?

7 MS. CLARK: I think we could. You know,  
8 in theory, we could do that. I think it would be such  
9 an enormous waste of resources. I can't imagine that  
10 that makes sense. The fact of the matter is --

11 CHAIRMAN FARRAR: But other than the  
12 resource thing, it hurts. It hurts his client, not  
13 you.

14 MS. CLARK: Well, it does. It does. But  
15 it's just in the practical context, it doesn't seem to  
16 make sense to me. The fact of the matter is, if we're  
17 going to hearing in February or March, we are actually  
18 now on the eve of the hearing.

19 This is not a situation where there's a  
20 long time ahead, and he can't decide now. I think  
21 it's critical, especially if he wants this expedited  
22 type of hearing, that he fully comply with discovery;  
23 that he give us all his claims and defenses before we  
24 go to deposition.

25 I think realistically, that's the only way

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1 this could be accomplished.

2 CHAIRMAN FARRAR: Mr. Hibey, before Ms.  
3 Clark sits down, did you and your team come up with a  
4 case which says it's okay not to have a deadline and  
5 you can change your mind at the last minute?

6 MR. HIBEY: Well, I still am looking  
7 through my notes, but I seem to recall --

8 COURT REPORTER: Could you speak in the  
9 mike, counselor?

10 MR. HIBEY: I seem to recall that it was  
11 one of the costliness cases.

12 CHAIRMAN FARRAR: What do you -- well, let  
13 me ask the question a different way.

14 MR. HIBEY: It might have been the Nash  
15 case.

16 CHAIRMAN FARRAR: What do you gain by  
17 reserving to the last minute your right to change your  
18 mind? That's what I guess that answers.

19 MR. HIBEY: A change in circumstances. I  
20 don't know what, for example, the trial judge is going  
21 to do in the criminal case with pending motions.  
22 There's going to be some litigation. The judge has  
23 expressed his concern about one of those motions.

24 CHAIRMAN FARRAR: Which one?

25 MR. HIBEY: The motion to sever. The

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1 motion to sever, and I don't know what that is going  
2 to mean. There was an immediate response by the  
3 government as to how they were going to deal with it,  
4 and it seemed to have given the judge some comfort  
5 that there was an approach to his concern. But that  
6 needs to be litigated.

7 I don't know how that's going to come out.  
8 I don't know what impact that will have on the case.  
9 It's hard for me to know once these issues are joined,  
10 and they don't get joined for another few days,  
11 exactly how that's all going to shake out with the  
12 trial court.

13 CHAIRMAN FARRAR: You don't like  
14 proceeding when you don't know how the proceeding's  
15 going to proceed, do you?

16 MR. HIBEY: That's the idea, Your Honor.

17 CHAIRMAN FARRAR: Well, that's kind of  
18 what Ms. Clark has been telling us.

19 MR. HIBEY: The only problem is Ms. Clark  
20 doesn't stand in my shoes, and I think we've been  
21 trying to make that distinction for the Court's  
22 edification today.

23 CHAIRMAN FARRAR: Thank you. Go ahead,  
24 Ms. Clark.

25 MS. CLARK: Okay. I just have just one

1 last point.

2 CHAIRMAN FARRAR: Okay. So you want to  
3 move up -- you don't need the trial exhibits --

4 MS. CLARK: I think I --

5 CHAIRMAN FARRAR: Wait a minute. Mr.  
6 Hibey, let me ask you this. December 15<sup>th</sup>, you had  
7 identify the potential witnesses who might be called,  
8 and then February 10<sup>th</sup>, you're going to ID the  
9 witnesses who may be called in the case-in-chief.  
10 Could that second group be larger than the first  
11 group, or --

12 MR. HIBEY: In other words, something  
13 might come up in deposition that would prompt us to  
14 want to put somebody on the final witness list.

15 CHAIRMAN FARRAR: Oh, because at first I  
16 thought December 15<sup>th</sup> was the large universe of who  
17 might be involved, and February 10<sup>th</sup> was okay, we've  
18 narrowed it down and it will only be these.

19 If on February 10<sup>th</sup> you come up with some  
20 new people, and we've said we'll have a hearing on  
21 February 24<sup>th</sup>, Ms. Clark's going to say "Wait a  
22 minute. I didn't know those people were involved.  
23 Let's start up again."

24 I thought it worked the other way. You  
25 put the large group on first, and then you narrowed it

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1 down. I didn't know you threw out some names and say  
2 well, we'll give you the rest later.

3 MR. HIBEY: No. What might happen is  
4 during the deposition period, somebody's name comes  
5 up. We would try and depose that person.

6 CHAIRMAN FARRAR: So these would be other  
7 witnesses whom you could not reasonably have foreseen  
8 should be included in the first list?

9 MR. HIBEY: Exactly, yes, in the first  
10 list. They come up during the deposition.

11 CHAIRMAN FARRAR: So for each of those  
12 people, anyone who wants to say that would have to say  
13 here's why I didn't tell you on December 15<sup>th</sup>, because  
14 I had no way of knowing?

15 MR. HIBEY: Yes. We didn't understand  
16 what that witness' significance was until we heard his  
17 name discussed and his activities stated. Then if we  
18 can get him deposed, we depose him. If not, then we'd  
19 just call him.

20 CHAIRMAN FARRAR: How do you like Ms.  
21 Clark's suggestion that we do the descriptions of  
22 claims and defenses, and let's use that word. Mr.  
23 Hibey, you used the word "contentions," but  
24 contentions is a magic word around this building. So  
25 let's not use that. We'll use the word -- we call

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1           them claims and defenses. You'll do that.

2                       She wants that done before the December  
3           15<sup>th</sup> thing. In other words, how are you going to do  
4           all these -- how are you going to list your witnesses.  
5           -- she's saying how am I going to list my witnesses if  
6           I don't know what your claims and defenses are?

7                       Or are you saying she -- God bless her,  
8           she's got a case. It's her order. She's got to go  
9           forward and put on a case.

10                      MR. HIBEY: That's what I keep coming back  
11           to. They did do this already. They did pull the  
12           trigger. I mean they know what their position is, and  
13           they should be able to understand, again from the  
14           discovery they've ascertained and that they should  
15           have, what the status of the evidence is. That should  
16           be it.

17                      CHAIRMAN FARRAR: You know, that's great  
18           and she could put together the whole case and tell us  
19           there's 100 possible witnesses, get prepared on all of  
20           them and they be worn down from lack of resources and  
21           then you'd eventually say "Oh, our only defense is X."

22                      You would have succeeded in putting them  
23           through a lot of work for no purpose. But why would  
24           we want to do that?

25                      MR. HIBEY: Well, we don't want to do

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1 that, and I'm not going to buy into the notion that  
2 that's how I approach the drafting of a pretrial  
3 statement.

4 I mean I have a responsibility to the  
5 Court, my client and the profession to do this thing  
6 on a proper and efficient basis, and that's what I  
7 would do.

8 CHAIRMAN FARRAR: But where in the civil  
9 rules, in ordinary litigation, are claims and defenses  
10 stated at the last minute? I can't remember exactly  
11 what the Federal Rules of Civil Procedure say about  
12 answers, but I think it says something about answers,  
13 that all claims and defenses have to be presented in  
14 your first pleading. You're saying you're going to do  
15 them in your last pleading.

16 MR. HIBEY: Yes. I'm saying that we would  
17 lay it out in the pretrial brief at the end of  
18 discovery.

19 CHAIRMAN FARRAR: But in the Federal Rules  
20 of Civil Procedure, which by analogy have some worth  
21 here, and I think we've quoted them a lot in our last  
22 decision, that's the first thing you do, not the last  
23 thing.

24 MR. HIBEY: Well again, Your Honor, we  
25 have the 800 pound gorilla of the Fifth Amendment in

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1 what is effectively an enforcement action, in which  
2 the detriment has already been imposed. Therefore, it  
3 changes the dynamic that's at work here.

4 CHAIRMAN FARRAR: We have no -- the  
5 subject has never come up amongst us about gee, this  
6 is a dreadful thing, that you're claiming the Fifth  
7 Amendment.

8 Everyone concedes that that's your right  
9 to do, and there's no -- the staff has not asserted  
10 and none of us have ever harbored that thought, that  
11 there should be some sanction and the case says, nope,  
12 this is fine.

13 But once it's claimed, find some  
14 accommodation. So I don't understand why the  
15 accommodation is you don't have to file your claims  
16 and defenses in your answer like the Federal Rules of  
17 Civil Procedure. You file them at the last minute,  
18 after all discovery is complete.

19 I've never been a civil proceeding where  
20 you don't know until after discovery anything about  
21 what the person is alleging. It's kind of an  
22 iterative process.

23 You file your answer, then you do some  
24 discovery, you have a prehearing conference or you  
25 have a prehearing conference. The judge says what's

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1 this case about, what the case is about. The judge  
2 says go off and do discovery. But I've never heard of  
3 doing discovery in the dark.

4 MR. HIBEY: Well, to the extent that the  
5 staff has been interested in the claims and defenses  
6 of Mr. Geisen, as they implicate Mr. Geisen  
7 testimonially, that information should not be  
8 forthcoming.

9 CHAIRMAN FARRAR: I'm not talking Mr.  
10 Geisen testimonially. I'm talking how you're going to  
11 defend the case.

12 MR. HIBEY: Indulge me.

13 (Pause.)

14 MR. HIBEY: I'm reminded that when we  
15 answer, upon the insistence of the staff, and  
16 consistent with their interpretation of the rules that  
17 govern this proceeding, we admitted and denied in that  
18 particular pleading. So they're not without  
19 information as to what we admitted and what we denied.

20 CHAIRMAN FARRAR: Weren't those mostly  
21 general denials?

22 MR. HIBEY: I would think they were, yes.

23 CHAIRMAN FARRAR: Okay. Ms. Clark --

24 MR. HIBEY: Which means they have to prove  
25 those points.

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1 CHAIRMAN FARRAR: Okay, Ms. Clark. I take  
2 it we don't have your ready agreement to this  
3 proposal?

4 MS. CLARK: No.

5 MR. HIBEY: I'd like to say a few things.

6 CHAIRMAN FARRAR: No, no. She was  
7 answering my question. I want to make sure --

8 MS. CLARK: Not quite yet.

9 CHAIRMAN FARRAR: --that before she  
10 finished, that I wasn't making any unjustified  
11 assumptions. Okay, go ahead.

12 MS. CLARK: The idea that somehow our  
13 action in taking this enforcement, in issuing this  
14 enforcement order somehow obviates any necessity for  
15 Mr. Geisen to comply with discovery is simply  
16 unfounded.

17 Yes, we took the enforcement action. We  
18 know that Mr. Hibey disagrees with us. But this does  
19 not mean that, you know, somehow he's relieved of  
20 complying with civil discovery. The fact of the  
21 matter is he has the right to claim the Fifth  
22 Amendment, but there are consequences to doing that.

23 If he really disagrees with those  
24 consequences, then he can agree to a stay and we can  
25 go forward after the completion of the criminal

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1 proceeding. This is his choice.

2 We're simply asking that he make that  
3 choice at a reasonable time, that gives us the  
4 opportunity to go forward, define the issues in this  
5 case, and as a practical matter, in order to be able  
6 to complete our discovery process so that we can go  
7 forward with an expeditious hearing.

8 CHAIRMAN FARRAR: Is that it?

9 MS. CLARK: That's it.

10 CHAIRMAN FARRAR: Thank you, Ms. Clark.  
11 Mr. Hibey?

12 MR. HIBEY: They have now turned this into  
13 a motion to compel discovery. That's what this  
14 hearing is about now. It is predicated upon the  
15 failure of them, meaning the staff and the government,  
16 to amass the evidence that they do have.

17 The idea is stunning that the Justice  
18 Department will stand up here and say that they won't  
19 give that statement of February 5<sup>th</sup> to the staff, and  
20 that the grounds -- and this is why I was asking for  
21 the right of cross-examination, is to really highlight  
22 this point. The idea that the information is --

23 CHAIRMAN FARRAR: But suppose we had the  
24 power to order the Department of Justice to give them  
25 that statement. That doesn't help your case. That

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1 hurts your case. It makes them better prepared.

2 MR. HIBEY: They can have the statement,  
3 Your Honor. The Justice Department is the ones that  
4 won't give it to them.

5 CHAIRMAN FARRAR: No, but I said suppose  
6 we said okay, by the powers vested upon us, turn over  
7 that statement, you're not any better off if we made  
8 that ruling. You're worse off, because now the staff  
9 is better prepared, because now they know what your  
10 guy said in these interviews.

11 MR. HIBEY: I don't think I would agree  
12 with that at all. Obviously, I'm going to have to be  
13 dealing with that statement somewhere, and I'm going  
14 to be dealing with it. Whether I have to deal with it  
15 here or deal with it there or both places, we'll be  
16 dealing with it.

17 So I don't accept that. What I really  
18 don't accept, and what this panel should not accept,  
19 is that somehow that statement isn't producible to the  
20 staff, because it's derived from the grand jury. We  
21 were there. We were there. It cannot have been a  
22 grand jury proceeding.

23 CHAIRMAN FARRAR: Okay. Do you want ten  
24 days to file supplemental briefs on that question? In  
25 other words, we asked the Department of Justice people

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1 here. They made a representation.

2 We may agree or disagree that that's a  
3 sound policy or that they're not being excessively  
4 bureaucratic. But that's their policy.

5 MR. HIBEY: Why should I have to pay for  
6 that policy? That's my point.

7 CHAIRMAN FARRAR: And so we accept the  
8 representation that they're not going to give it up.  
9 That may be a sensical or a nonsensical position, but  
10 that's their position and we plan to go forward with  
11 the case and that representation.

12 Now so maybe supplemental briefs wouldn't  
13 help, because we can make any ruling we want or any  
14 decision we want and the Justice Department's not  
15 going to abide by it.

16 MR. HIBEY: It won't. Exactly. But the  
17 point I'm simply trying to make is that I'm at a loss  
18 to understand the legal basis for their not doing  
19 that, because --

20 CHAIRMAN FARRAR: But don't worry about  
21 it. You have the document. You can use it in the  
22 criminal case. I suppose you can't segregate your  
23 brain, so you're going to draw on it for this case.  
24 So let's move forward. That's the situation.

25 You may be right, that that's the most

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1 foolish, illogical position you've ever heard, but  
2 that's the position they're taking; that's the  
3 position you find yourself in. How do we move forward  
4 with this case?

5 MR. HIBEY: In the fashion I proposed.

6 CHAIRMAN FARRAR: Okay.

7 ADMIN. JUDGE HAWKINS: Mr. Hibey, they  
8 request --

9 MR. HIBEY: Yes, Your Honor.

10 ADMIN. JUDGE HAWKINS: They request the  
11 claims and defenses before they are able to identify  
12 potential witnesses. Did I understand you correctly  
13 that providing that largely would be inconsistent with  
14 your client's --

15 MR. HIBEY: Fifth Amendment rights.

16 ADMIN. JUDGE HAWKINS: Fifth Amendment  
17 privilege?

18 MR. HIBEY: It would, at this point,  
19 implicate the Fifth Amendment. But I have to concede  
20 that to the extent that those -- it's hard for me to  
21 even make a concession along those lines.

22 I just have to say that we can put down,  
23 in a pretrial brief, what the contentions are or  
24 strike the word contentions, because apparently it's  
25 a mantra around here. But we would put down whatever

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1 the defenses are, that they are not at a loss today as  
2 to our position for two fundamental evidentiary  
3 reasons.

4 One being the response we made to the  
5 petition or the complaint that initiated the  
6 litigation, and secondly, what I contend they actually  
7 or constructively have by way of the various  
8 statements that are attributed to Mr. Geisen by way of  
9 statements of interviews conducted by various  
10 investigators who are all over this case for a number  
11 of years.

12 ADMIN. JUDGE HAWKINS: It's conceivable to  
13 me though, that given the number of witnesses that are  
14 involved, given the potential claims and defenses that  
15 would be available to you, when you list them in your  
16 pretrial brief, it may catch them by surprise and they  
17 may come back to us and say we need to engage in  
18 further discovery, which then would move things back,  
19 perhaps conflict with the criminal trial.

20 How would you deal with that or how would  
21 you propose that we deal with that?

22 MR. HIBEY: I would propose to deal with  
23 that by arguing that the positions are without merit,  
24 and be able to point to --

25 ADMIN. JUDGE HAWKINS: When you say

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1 "positions," can you be a little more specific?

2 MR. HIBEY: That if they say, "Oh here's  
3 a defense we didn't think of, that apparently he's  
4 going to travel on, and we haven't taken any discovery  
5 on it," I will fundamentally argue that that's without  
6 merit, and then point to the record, as to why that  
7 should be rejected.

8 You know, it isn't as though they are  
9 traveling in the dark. They've been taking  
10 depositions, where we are not parties. You know that,  
11 in the Miller and Moffett cases.

12 CHAIRMAN FARRAR: But you can get copies  
13 of those?

14 MR. HIBEY: Sure. I can get copies of  
15 that, and I'm interested in them because they ask  
16 about Mr. Geisen in those particular depositions. It  
17 isn't as though they have -- that they have been lying  
18 dormant and just simply waiting for us to make some  
19 statement.

20 They've been actively and aggressively  
21 going out and asking questions about Mr. Geisen in  
22 depositions that we are not party to.

23 I mean that's why this idea that they are  
24 just totally mystified or haven't got a clue about  
25 what's going on I think is more of a product of Ms.

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1 Clark's just coming to the case than it is that the  
2 staff hasn't been working on this thing for however  
3 long.

4 CHAIRMAN FARRAR: Maybe it's a product of  
5 reading the Federal Rules of Civil Procedure and  
6 *Hickman v. Taylor*, and everything that's happened  
7 since then and saying we're entitled to have this.

8 I mean you could make the same argument  
9 you just said about every litigant who's in a favored  
10 position in terms of balance of information. You  
11 could make it in every case, and the answer is no,  
12 there's no more surprise. Everyone's entitled to know  
13 what's on the other guy's mind.

14 MR. HIBEY: Your Honor, this is not  
15 *Hickman v. Taylor* alone. This is *Hickman v. Taylor*  
16 and its progeny.

17 This gets us to *Greystone* and *Kitco* and  
18 cases like that, where they have -- where the Courts  
19 have said "Look, we're not going to follow  
20 *Symaticolor*. We're going to get into the weeds here  
21 and understand what the particular dynamics are that  
22 are at work, and where we understand that there is a  
23 cost that will not be paid for the invocation of the  
24 Fifth Amendment. We're not going to go into  
25 preclusion in this instance. We're going to" --

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1 CHAIRMAN FARRAR: We read all those cases,  
2 and I daresay you'd hardly find a court, any of those  
3 courts that was more willing to listen to your  
4 concerns and to do this in a way that's not a  
5 sanction, not a punishment, no more costly.

6 In that regard, I need to -- in answer to  
7 Judge Hawkins, you said for you to talk about your  
8 defenses implicates the Fifth Amendment.

9 I don't understand that. Your client,  
10 assuming he's not going to testify. You can say "My  
11 client's not going to testify, but I'm going to show  
12 that he didn't do this."

13 You're not going to show it through his  
14 voice, but you're going to show that he didn't do what  
15 he's accused of doing. That doesn't implicate the  
16 Fifth Amendment to say "I, Mr. Hibey, am going to  
17 prove that, and I'm going to prove it through certain  
18 witnesses. I'm not going to put Mr. Geisen on the  
19 stand."

20 So I don't understand how that implicates  
21 the Fifth Amendment, and second -- well, go ahead.  
22 Tell me how that implicates the Fifth Amendment, for  
23 you to say what your approach is going to be.

24 MR. HIBEY: The link in the chain. Then  
25 comes the argument on the part of the staff that they

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1 need to have Mr. Geisen's testimony in order to  
2 understand to what extent all of these --

3 CHAIRMAN FARRAR: They're not getting Mr.  
4 Geisen's testimony.

5 MR. HIBEY: They aren't, no.

6 CHAIRMAN FARRAR: Right. You're going to  
7 claim the Fifth Amendment. They're not going to get  
8 it. They can say we'd like his testimony. Then they  
9 sit down. He claimed the Fifth. That's it.

10 MR. HIBEY: That's right.

11 CHAIRMAN FARRAR: They're not going to  
12 get. So you telling what your defenses are isn't  
13 going to get them to have Mr. Geisen's testimony.

14 MR. HIBEY: Well, it's only when our  
15 discovery is over that our defenses will be  
16 articulated. They're the ones who have the burden of  
17 proof, and we have to deal with whatever that burden,  
18 however they purport to meet that burden.

19 CHAIRMAN FARRAR: Okay. I don't see how  
20 it implicates the Fifth Amendment. Now on your next  
21 point, I don't know why it's not in your interest to  
22 move forward on a rapid schedule, with no chance that  
23 the staff will come back and say "Oh oh. Right before  
24 the trial, you told us something we didn't know, and  
25 we'd like to redo some things," because isn't the best

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1 thing in your client's interest to have a trial in  
2 front of us, on the hope that he wins in front of us  
3 and you run down or run over to Western Ohio and say  
4 collateral estoppel?

5 Why do you want to take -- for the life of  
6 me, I don't know why you want any risk that this thing  
7 doesn't go forward in February, and the way you've  
8 structured it you've got every risk, because I've told  
9 you that if you change your mind on the Fifth  
10 Amendment.

11 Or you come up with some new witnesses and  
12 Ms. Clark comes in and says "I need to depose them,"  
13 that late February trial is off and any collateral  
14 estoppel argument you have is gone. I'm not -- it's  
15 like I'm missing something here.

16 MR. HIBEY: They're contingencies, that's  
17 all. I mean I can't stand here and rule them out,  
18 because I don't know what the change in circumstances  
19 could possibly be. But they're mere contingencies.  
20 In other words, if the contingencies don't eventuate,  
21 we're on track to try the case.

22 CHAIRMAN FARRAR: Okay. Do you have  
23 anything more for Mr. Hibey?

24 ADMIN. JUDGE HAWKINS: I had one question  
25 for you. On page 17 of your brief, you said "If this

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1 Board entered a preclusion order of the type sought by  
2 the staff, that would effectively infringe Mr.  
3 Geisen's constitutional rights and amount to a *de*  
4 *facto* extension of the enforcement order."

5 MR. HIBEY: Yes.

6 ADMIN. JUDGE HAWKINS: Why would it be a  
7 *de facto* extension of the enforcement order? Because  
8 you'd withdraw your request for an expedited hearing?

9 MR. HIBEY: No, because the relief -- once  
10 again, getting back to what I thought was why we're  
11 here, the relief was to abate the case, pick it off,  
12 put it into the distance somewhere.

13 So what we're talking about is that kind  
14 of relief in effect operating as an extension. Why?  
15 Because we exercised our constitutional rights. We're  
16 here because we took the Fifth in response to certain  
17 discovery requests.

18 The response back was then let's continue  
19 the case until after everything. Our brief was  
20 pitched to that, Your Honor.

21 ADMIN. JUDGE HAWKINS: All right, okay.  
22 I just want to make sure I'm clear on this. Let's say  
23 that we issue a preclusion order consistent with their  
24 request, which says if you do not --

25 You know, you declare whether you wish to

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1 continue with the assertion of the privilege. You  
2 declare by a certain date your defenses and claims.  
3 If you don't declare them at that point, you've waived  
4 them. You cannot raise them at the trial.

5 I'm wondering when you say that would be  
6 a *de facto* extension, does that mean you would not be  
7 willing to go forward, then, with the administrative  
8 process, and you'd rather go forward with the criminal  
9 trial, or are you willing to take a position on that?  
10 I'm just trying to understand your sentence.

11 MR. HIBEY: No. I thought the sentence  
12 was pitched to the concept of an abatement, of merely  
13 putting it off.

14 ADMIN. JUDGE HAWKINS: The stay.

15 MR. HIBEY: Yes. I'm sorry if that's not  
16 clear. But that was my understanding of that  
17 particular sentence, that the trade-off issues were  
18 assertion of the Fifth. Therefore, there will be an  
19 abatement.

20 Therefore, because you've taken the Fifth,  
21 you've paid a price of causing the case to be extended  
22 out into the ether somewhere, is what I think all that  
23 sentence means.

24 CHAIRMAN FARRAR: Anything else, Mr.  
25 Hibey?

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1 MR. HIBEY: I don't believe so, Your  
2 Honor. I think that covers it.

3 (Pause.)

4 CHAIRMAN FARRAR: If you'll indulge us.  
5 It's 25 after. Let's take a ten minute recess, and at  
6 that point we will either tell you what we're  
7 thinking, or tell you that we don't know what we're  
8 thinking and take the case under submission. So let's  
9 take a ten minute break. We'll be back at 25 of.

10 (Whereupon, a short recess was taken.)

11 BENCH DECISION

12 CHAIRMAN FARRAR: Thank you. Please be  
13 seated. We decided to decide the case now from the  
14 bench, because to write a decision with all the  
15 principles involved would take some time, and this  
16 case deserves to move forward quickly.

17 You were promised an expedited hearing,  
18 and we don't want to delay. We want to do everything  
19 to accomplish that. If we had written a decision, it  
20 would basically have been built around those Second  
21 and Third Circuit cases which say take the case and  
22 figure out what the best approach is.

23 Here's our ruling. Ten days after the  
24 conclusion of written discovery, as that term is  
25 defined in that three-part test of which there -- it

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1 all depended on your motions to compel discovery, Mr.  
2 Geisen is to make a definitive indication oif whether  
3 he's going to invoke the Fifth Amendment privilege.

4 Assuming he does invoke it, that can only  
5 be undone later on motion and good cause shown, and he  
6 should have full awareness that if that is done and i  
7 we were to grant the motion to let him change his  
8 mind, there would be appropriate conditions placed on  
9 the future course of the case.

10 The second part of this, since the parties  
11 are now negotiating the motion to compel discovery,  
12 we'd like them or the motions about the written  
13 discovery, we'd like them to also negotiate by  
14 December 1<sup>st</sup> a schedule, along the lines that Mr.  
15 Hibey proposed for the future course of the case. But  
16 the claims and defenses part of that is to be first,  
17 rather than later.

18 Failing agreement -- it's to come first in  
19 the schedule rather than later in the schedule.  
20 Failing agreement, the parties' agreement on such a  
21 schedule, they should notify us by December 1<sup>st</sup> and we  
22 will set a schedule for the course of the proceeding,  
23 all with the intent of having this case tried in, if  
24 that tentative schedule is followed, late February or  
25 early March, mid-February to early March.

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1 We appreciate, and of course if you're  
2 close to an agreement by December 1<sup>st</sup> and you haven't  
3 reached it, you're welcome to seek an extension, which  
4 would be readily granted. We appreciate the effort  
5 the parties put into their briefs, that they put into  
6 the argument here, their efforts to answer our  
7 questions.

8 We particularly appreciate the assistance  
9 of their representatives from the Department of  
10 Justice, because it did help us get a better grasp on  
11 the case than we had or that your partners, the staff  
12 could have provided, because they're laboring, I  
13 assume, under the same disabilities we are.

14 So that's our ruling, and we issue it  
15 without any reasons, other than -- without any written  
16 reasons, and our reasoning, as I said, is embraced in  
17 those Second and Third Circuit cases, and in some of  
18 the predicates to the questions we've asked here.

19 I think you know what our thinking is, and  
20 you'll have to be content with that, so as to save  
21 several weeks in getting the case moving. So thank  
22 you all, and see you next time.

23 (Whereupon, at 5:40 p.m., the hearing was  
24 adjourned.)

25

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CERTIFICATE

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

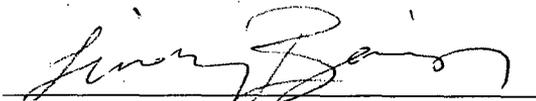
Name of Proceeding: Hearing ITMO

David Geisen

Docket Number: 1A-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.



Lindsey Barnes  
Official Reporter  
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