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UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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IN THE MATTER OF: || Docket No.
DAVID GEISEN || IA-05-052

||

Monday,
December 4, 2006

Via teleconference

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

3:01 p.m.

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2
3 CHAIRMAN FARRAR: On the record. We've
4 gathered today to conduct a prehearing dealing with
5 scheduling in the enforcement matter involving Mr.
6 Geisen and the events at Davis-Besse of several years
7 ago. This is Mike Farrar. I'm the Chairman of the
8 Licensing Board. With me are my brother judges Roy
9 Hawkins and Nicholas Trikouros and also our law clerk,
10 Meg Parrish. For Mr. Geisen?

11 MR. HIBEY: For Mr. Geisen, Richard Hibey,
12 Charles McAlber, Andrew Wise.

13 CHAIRMAN FARRAR: All with us again. Ms.
14 Clark, for the staff.

15 MS. CLARK: Lisa Clark, Michael Clark,
16 Michael Spencer, Brett Klukan, Mary Baty, Charles
17 Mullins and Chris Chancellor.

18 CHAIRMAN FARRAR: All right. Thank you.
19 Before we get to the pending motions, let me ask a
20 couple of questions. Are (Voice breakup) parties want
21 us to try to get a decision out by April 16th which is
22 the date of the, at least the current date, for the
23 parallel criminal trial.

24 MR. HIBEY: Was that a question to us?

25 CHAIRMAN FARRAR: Yes. Well, I guess Mr.

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1 Hibey primarily to you.

2 MR. HIBEY: You broke up. Your question
3 broke up and that's why I said is that a question to
4 us. I did not hear it clearly, Your Honor.

5 CHAIRMAN FARRAR: The question is we drew
6 up a tentative schedule which we have not shared with
7 anybody. It would have allowed for a decision by us
8 before April 16th which is start of the trial and the
9 parallel criminal case in Western Ohio. Were you all
10 -- Is there any hope or wish on your part that we
11 would have a decision out by April 16th?

12 MR. HIBEY: To be frank about it, I have
13 not given it thought because I felt that the Board
14 would tell us what it intended to do in terms of
15 timing.

16 CHAIRMAN FARRAR: The reason I'm asking is
17 the only reason I can think of to push everybody
18 mercilessly between now and then would be if you
19 thought you won you could make a collateral estoppel
20 argument. I'm not saying we could do it but I want to
21 know before we start discussions today if that's a
22 possible target.

23 MR. HIBEY: If we want if we had a
24 decision of this panel to that effect, I cannot tell
25 you sitting here that a collateral estoppel would be

1 - a principle on which we would prevail, but I know from
2 the way in which we would operate in practice that
3 that would be brought to the attention of not only the
4 court, but the prosecutor in a formal kind of way.

5 CHAIRMAN FARRAR: All right. Now if we
6 were going to conduct today's discussion on the basis
7 of that we'd have to move a lot faster than things
8 have been moving lately. So we'll just hold that for
9 now. I take it, Ms. Clark, I would guess it's not of
10 any particular consequence to you if we have a
11 decision out before then or not. Your interest is in
12 making sure you're prepared for the case, have
13 adequate opportunities to prepare both in terms of
14 receiving discovery and other things. Would I be
15 right otherwise it's a matter of indifference as to
16 whether we have a decision before the trial?

17 MS. CLARK: From the staff's viewpoint, we
18 don't have a position. I don't know if the Department
19 of Justice might. I have not discussed this with
20 them.

21 CHAIRMAN FARRAR: Why don't we do this?
22 Why don't we proceed on the basis that I think emerges
23 from your papers that both sides would like if
24 possible to have the trial completed, our trial
25 completed, before the criminal trial starts and as we

1 go through the agenda today, we'll see.

2 MS. CLARK: Well, just one point, while I
3 did not speak to Justice about whether they thought it
4 was important to have a board decision before the
5 criminal trial proceeds, they did represent to me that
6 they continue to have concerns with the case
7 proceeding before the criminal case begins and in
8 particular, they're concerned that our civil discovery
9 may impact the criminal proceeding and they wanted me
10 to convey to you that depending on how the case
11 proceeds they may yet seek another stay if they
12 perceive that there may be some impact on their
13 criminal case.

14 CHAIRMAN FARRAR: They'd be welcome to do
15 that. They would have to overcome doing so. In other
16 words, the things that they are concerned might happen
17 in the discovery process, they may, how can I put
18 this, be even more concerned now that those are
19 happening but they still would, you can advise them,
20 have to counter the notion that I think we put in that
21 first stay decision that the Government started with
22 a huge leg up in these cases. So they would have
23 overcome even if discovery has been largely one way
24 that that makes a big difference in the overall scheme
25 of justice. So if you'll just let them know that.

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1 But we'll be talking about whether discovery has been
2 one way or not later in today's call.

3 Let's get one other thing out of the way.
4 On the pre-filed versus oral testimony the usual
5 practice here has been to have pre-filed testimony.
6 That's been in cases in which we have lengthy and
7 detailed opinions by scientists and engineers about
8 scientific and technical principles and their
9 predictions of what might happen in the future. That
10 has always struck the Board as significantly different
11 from testimony about the significance or the
12 occurrence and the significance of past events. If I
13 have your positions, the staff wants pre-filed
14 testimony.

15 MS. CLARK: Yes, that's correct, at least
16 for expert testimony because we expect that we will
17 have some technical testimony in this case regarding
18 the condition of the reactor head, the events that
19 happened there and also on the actual submittals in
20 particular because in this case they have to be
21 compared to inspections. So we would expect that it
22 would be fairly lengthy expert technical testimony.
23 So for that reason, we think it would expedite things
24 to be able to present in pre-file form. Of course, as
25 a normal practice, we would present the experts orally

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1 as well and they would certainly be subject to cross
2 examination and examination by the licensing board as
3 well.

4 CHAIRMAN FARRAR: Now in some cases, when
5 you present them orally, you simply say who are you
6 and is this your testimony and you adopt it and we go
7 right into cross examination. Is that what you had in
8 mind?

9 MS. CLARK: I'm not certain yet but I
10 would expect that there would actually be some oral
11 testimony as well in addition to the pre-filed written
12 testimony, oral direct.

13 CHAIRMAN FARRAR: I will talk about this
14 later, but I assume that the oral direct would not be
15 duplicative or repetitive of what's in the written.

16 MS. CLARK: We would expect it would
17 supplement the written testimony.

18 CHAIRMAN FARRAR: Okay. Mr. Hibey, your
19 position was, Mr. Geisen's position was no pre-filed
20 is necessary at all. What do you think of the staff's
21 proposal as Ms. Clark as just stated it?

22 MR. HIBEY: I think it's that testimony
23 cloaked in the aura of someone would purport to be an
24 expert that I think that there are going to be some
25 real questions about the admissibility of all of that

1 and I don't know that the pre-filing of that testimony
2 will aid the determination of the ultimate questions
3 regarding Mr. Geisen. So I remain opposed to that as
4 a method of putting information, strike that, putting
5 evidence, admissible evidence, before this panel.

6 CHAIRMAN FARRAR: Ms. Clark, with that
7 being Mr. Hibey's position, suppose as I think the
8 Board is going to do we asked for pretrial briefs and
9 in each one required there be a summary of what you
10 intend to prove through each fact and/or expert
11 witness. Would that not be a compromise solution that
12 would accomplish the aims that both of you are trying
13 to do?

14 MS. CLARK: Do you mean a pretrial brief
15 explaining the outline of the testimony? I don't
16 think that would really be a substitute for the expert
17 testimony. I don't expect that our experts would be
18 presenting any evidence as to matters of fact. It was
19 not my anticipation that they're going to have any
20 knowledge or any specifics of the actual matters that
21 Mr. Geisen was involved with. They are simply going
22 to present testimony about corrosion, about how it
23 occurs, what the vessel head does, how it performs in
24 a reactor, how the systems work, those types of
25 matters.

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1 MR. HIBEY: What's -- You see I --

2 CHAIRMAN FARRAR: Hold on a minute. Let
3 us talk amongst ourselves for just a second here.

4 (Off the record discussion.)

5 CHAIRMAN FARRAR: We're back on the
6 record. As we discuss this either later today or more
7 in the future, let's distinguish then -- expert is
8 between background information that would help
9 everybody understand what happened to both the
10 company's actions, Mr. Geisen's actions, the staff's
11 actions and so we'll -- information about how this
12 corrosive process affects the function of the reactor,
13 not in this particular case, but just generally.
14 We're not deciding anything now, but we will entertain
15 receiving pre-filed testimony on that. But I think
16 our initial inclination even before we heard from
17 either party who wanted what our initial inclination
18 was that the less pre-filed testimony in this case the
19 better, that it's just that kind of case which is
20 different from all our other cases. Hold that
21 thought.

22 We'll move a little and this is trying to
23 get some clear understandings before we deal with the
24 pending motions. We asked the staff back in June or
25 after the denial of the first stay motion if they

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1 could accelerate their production of documents in less
2 time than the rules allowed because they had already
3 done it. Our impression is that the staff have done
4 that and have been diligent about their
5 responsibilities and I say that without fear of being
6 accused of favoring the staff because we have been
7 very -- we were on that first stay motion for example
8 very critical of their position.

9 With that background, Mr. Hibey, I have to
10 say to you that it bothers us that no documents were
11 produced by Mr. Geisen until November 29th and in
12 light of that startlingly is not too strong a word
13 that when Ms. Clark asked until December 11th to file
14 a motion on those documents you tell her you only
15 agreed to December 8th. Can you tell us what's going
16 on here?

17 MR. HIBEY: Sure. It was startlingly to
18 me as well. We've never had a problem accommodating
19 situations such as that. I think Mr. McAlber who is
20 here, Your Honor, might best address that because he's
21 the one that has been dealing with the staff on that
22 issue and with your permission, I would defer to him
23 to state our position on this.

24 MR. McALBER: Your Honor, this is Chas
25 McAlber. Let me just get the bottom line on this.

1 CHAIRMAN FARRAR: Wait. Before you start,
2 make sure you tell me and the rest of the Board why it
3 took to November 29th for anything to produced and
4 then tell me about the motion itself.

5 MR. McALBER: Well, I can address that,
6 Your Honor. Thank you. With respect to the initial
7 disclosures that we did in the case, the time that we
8 did those initial disclosures we were not aware of
9 documents, any responsive nonprivileged documents that
10 Mr. Geisen had in his possession to disclose. It was
11 only later that we came to be aware of and Mr. Geisen
12 came to be aware of two diskettes that he had in his
13 possession.

14 When we obtained those diskettes we
15 proceeded as expeditiously as possible to conduct a
16 review of those documents. One of the things that we
17 were trying to do in order to try to minimize the
18 delay and inconvenience here was to analyze which
19 portions of those documents had been previously
20 produced by the NRC or by in other proceedings in the
21 case. We did an analysis of those CDs and it took
22 longer than I had anticipated or wanted, but that was
23 the reality of dealing with the electronic images. We
24 had to get these diskettes to a vendor who would be
25 able to access and blow back copies to the documents

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1 and then try to do an analysis against the existing
2 database.

3 I had discussions with Ms. Clark all along
4 the line in that regard and I assured her as was my
5 intent that we would try to make that production as
6 quickly as possible. We ended up having the
7 production. We had to make sure that there were no
8 issues that FENOC council had with respect to any
9 proprietary documents or whatever other issues that
10 they had and once we had gotten those reviews done, we
11 produced the documents to Ms. Clark.

12 With respect to the production, I'd make
13 a couple of observations. First of all, we produced
14 a number of documents which I think it is fair to say
15 are out of an abundance of caution, we produced them
16 in case they might have been responsive. But most of
17 them were in fact not -- I don't think you're going to
18 be seeing them among the trial exhibits or have any
19 particular relevance to the issues before the Board in
20 this proceeding.

21 A substantial volume of documents we
22 generated a list where there were copies of documents
23 on the diskettes that Mr. Geisen had that had already
24 been produced in the case and we provided that list to
25 NRC staff. They have raised and brought to the

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1 Board's attention in their motion two groups of
2 documents. No. 1 were documents that we had some
3 issues concerning their protected status. There were
4 approximately, I may have this number wrong, about
5 seven documents that we identified for which there was
6 no previous match in the production that have been
7 marked as proprietary documents by among others,
8 companies like Framatome.

9 Our concern was producing those documents
10 without having an understanding of whether or not they
11 were still intended to be protected at least from
12 Framatome's perspective. These again are not
13 documents that we anticipate are centrally relevant to
14 the allegations in this case.

15 There were three emails from FENOC Council
16 to Mr. Geisen well after the central events in 2001 in
17 this case and we have been in discussions with FENOC
18 Council about whether those emails again which I would
19 without disclosing the substances I would indicate are
20 not substantively relevant in this proceeding but we
21 are going to be providing a log of those.

22 There was a group of documents that Ms.
23 Clark asked about that had Bates numbers from prior
24 productions that she had questions about. These are
25 approximately 11 documents out of the scores and

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1 scores of documents that we produced that we had given
2 a list where we had thought they had had them, that
3 they were produced before. Some of the documents are
4 simply copies of the written responses, FENOC written
5 responses, that are at issue in this case and that the
6 staff already has copies of and I'm going to be
7 responding to Ms. Clark and giving her a detailed of
8 those.

9 But in terms of, Your Honor, the original
10 disclosure response that we made at that time we were
11 not aware of any documents in Mr. Geisen's possession
12 and it was only after we became aware and began
13 conducting the review that we attempted to do that as
14 quickly as we could.

15 ADMIN. JUDGE HAWKENS: What date did you
16 first become aware of the diskettes?

17 MR. McALBER: Your Honor, I don't have the
18 precise date with me. It was, I believe, sometime in
19 late September.

20 CHAIRMAN FARRAR: Mr. Reporter, that was
21 Judge Hawken just then.

22 MR. McALBER: And we tried to conduct the
23 review. I told Ms. Clark along the lines what we were
24 trying to do and the review ended up taking longer
25 than I had hoped or anticipated. But it was not in

1 any respect whatsoever to try to prejudice the staff
2 and indeed I think a fair reading of the production
3 that did occur is that it does contain many documents
4 that are particularly relevant to the allegations in
5 this case.

6 CHAIRMAN FARRAR: And when she says this
7 is the first I've seen some of these things. I need
8 until December.

9 MR. McALBER: That is fine with us, Your
10 Honor.

11 CHAIRMAN FARRAR: Thank you.

12 ADMIN. JUDGE HAWKENS: Judge Hawkens.
13 That really does not look with favor upon parties
14 filing motions engaging in disagreements and then
15 waiting to make concessions at the prehearing
16 conferences. I would urge not only the staff but
17 strongly urge Mr. Geisen's counsel as well to work
18 this out among themselves and not get the Board
19 involved.

20 MR. McALBER: Yes Your Honor.

21 CHAIRMAN FARRAR: Ms. Clark, in light of
22 all this, do you have any comment you would like to
23 make?

24 MS. CLARK: The only comment I would make
25 and I hate to feel that maybe I need to say this

1 during this call is that there as I told Mr. McAlber
2 a number of Bates numbers that are completely
3 unrecognized to the staff. He has DOJ Bates numbers
4 and also UCS Bates numbers.

5 When I spoke with him when I got this
6 document, he simply advised me that he would get back
7 to me. In light of what he said today, I certainly
8 hope that we can expect to get a detailed statement of
9 what these documents are in the very near future so
10 that we can even make the December 11th date.

11 CHAIRMAN FARRAR: All right. Let me say
12 what Judge Hawkens just said and say it in a different
13 way. If we have to get involved in disputes like
14 this, we're not going to have them try as hard as we
15 can. An expedited hearing isn't going to happen
16 before April 16th and it may not even happen before
17 the Districts Court fall back date. These are things
18 you all understand. These are things you all have to
19 work out.

20 MR. McALBER: Yes. And, Your Honor, this
21 is Chas McAlber and I do apologize and in all of the
22 discussions that I've had with Ms. Clark, we have
23 reached many agreements on many issues and that's
24 certainly my goal. In a very quick conversation that
25 occurred on November 30th, Ms. Clark asked if we would

1 consent to an extended date for the filing of the
2 motion to compel regarding the document production
3 issues. I said absolutely yes.

4 The issue I raised with her because of the
5 tight scheduling that we've been trying to work on and
6 we were in the midst of these scheduling discussions
7 was whether they could file the motion to compel on
8 Friday, the 8th. Part of my thinking in that regard
9 was because I did not think that there would be any
10 issues regarding the production as it occurred and so
11 I thought that having a motion filed on December 8th
12 would assist in the scheduling. I did not mean to be
13 obstructionist to this and it was only subsequent that
14 Ms. Clark filed her motion and we had not even filed
15 a response yet to that.

16 So I did not mean to be obstructionist in
17 it and there are many, many issues that I worked
18 painstakingly to reach agreement with Ms. Clark on and
19 successfully so in the past. I will recommit to that.
20 I apologize to the Board for giving an appearance
21 otherwise on this issue.

22 CHAIRMAN FARRAR: Thank you, Mr. McAlber.
23 We appreciate that explanation and that commitment.
24 Let's talk about the exercise of the Fifth Amendment
25 privilege. Regardless of what we say in the next few

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1 minutes, the Board's view is in line with those cases
2 we talked about at the last oral argument. There is
3 to be certainly no penalty on the exercise of that
4 privilege. The Board doesn't frown upon it. We're
5 not trying to discourage it, but those same cases say
6 we have to make the proceeding be we may have to issue
7 orders, major preclusion or inferences or whatever in
8 order to make it a fair proceeding. So let's have
9 that as the background for anything we say in the next
10 few minutes.

11 If the debate between the two parties on
12 the Fifth Amendment claims bought you a little bit of
13 closure, we're concerned that that is going to end up
14 having to make some very difficult and significant
15 rulings, not the kind of rulings we can make from the
16 bench or without explanation of their significance.
17 So we want to try to use a few minutes here to see if
18 we can't narrow the scope of disagreement.

19 According to the Hoffman case where judges
20 are not allowed to look too much behind the claim in
21 order to test it, there is a way of looking at, at
22 least raises the question of overbreadth. Let me give
23 you a couple of examples. At the oral argument we
24 talked about the answer Mr. Geisen filed way back
25 nearly a year ago. Upon reading that again, it had

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1 some more specific answers in it than we had recalled.
2 He had some of those same things, matters on which
3 he's claiming that privilege now.

4 There were other questions in the
5 interrogatories or admissions that seemed to be
6 straightforward factual matters like did the staff put
7 out this document. So there are some parts of the
8 claim that seem overbroad. (1) That's going to lead
9 to a lot of time resolving it if you all can't resolve
10 and (2) I assume it leads to a broader rather than a
11 narrower preclusion order about what testimony Mr.
12 (Audio breaks up) broader Fifth Amendment claim of
13 (Audio breaks up).

14 MR. HIBEY: We're losing you. We're
15 losing you and your voice keeps breaking up.

16 CHAIRMAN FARRAR: Sorry. I was a little
17 bit away from the speaker. I was saying the broader
18 the Fifth Amendment claim the broader the other side
19 can argue for a preclusion order. Mr. Hibey, let me
20 ask you if there isn't some way to provide the staff
21 more answer than they've had before or whether it's
22 important to stand on the precise claims you've made
23 and finally, when is the right date to make you state
24 definitively whether you're going to claim the
25 privilege for purposes of this proceeding?

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1 MR. HIBEY: Would you allow us a moment to
2 confer?

3 CHAIRMAN FARRAR: Sure.

4 MR. HIBEY: Thank you.

5 (Discussion off the record.)

6 MR. HIBEY: We're back on the air.

7 CHAIRMAN FARRAR: All right. Go ahead.

8 MR. HIBEY: I think we can bring some
9 clarity to the situation for you now, Your Honor.
10 We'll tell you today that we're going to invoke the
11 privilege. We understand any change in that
12 circumstance has consequences of the sort that have
13 been identified by the Board on at least two
14 occasions. Our position is that we are invoking the
15 privilege and we're telling it to everybody now.

16 Second, we will go back and look at
17 certain interrogatories to see if consistent with that
18 implication of privilege we may nevertheless make
19 responses or give responses to some of the
20 interrogatories that have been propounded. But it
21 must be made clear that the meaningful invocation of
22 the privilege under the Fifth Amendment must take into
23 account the concern for waiver that arises under the
24 link in the chain principle, a doctrine well
25 established in our jurisprudence that where you answer

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1 to one question it may be to your being required to
2 answer another and that because you have not waived
3 privilege. We don't intend to. So with that in mind,
4 we will go back and look at certain of the
5 interrogatories that have been propounded.

6 CHAIRMAN FARRAR: All right. We
7 appreciate that offer and we do understand the
8 business about waiver and link in the chain, but with
9 that in mind, if you would go back and see if there's
10 something more you can do, that would be a help.

11 MR. HIBEY: Yes Your Honor.

12 CHAIRMAN FARRAR: Ms. Clark, any thoughts
13 on that?

14 MS. CLARK: No Your Honor. I just think
15 maybe perhaps we should set a deadline then for them
16 to respond to our interrogatories.

17 CHAIRMAN FARRAR: Mr. Hibey, it was your
18 offer. How quickly do you think you can do that?

19 MR. HIBEY: Tuesday of next week.

20 CHAIRMAN FARRAR: Thank you.

21 MR. HIBEY: That's the 12th.

22 CHAIRMAN FARRAR: In terms of the more you
23 claim the Fifth, the less the staff knows about the
24 case you're going to present.

25 MR. HIBEY: That I with all due respect do

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1 not accept that as an operative principle. What it
2 takes into account is what is in the record and what
3 they do have. I simply respectfully would disagree,
4 Your Honor.

5 CHAIRMAN FARRAR: Ms. Clark, did I get
6 that from you or was I making it up myself?

7 MS. CLARK: I'm sorry. What's that?

8 CHAIRMAN FARRAR: The proposal I just
9 advanced that Mr. Hibey took issue with.

10 MS. CLARK: Yes. I think this was --

11 CHAIRMAN FARRAR: I assume I got -- I'm
12 blaming you for where that came from.

13 MS. CLARK: Yes, absolutely, and you know
14 this of course was a subject of our motions in our
15 preclusion order, request and the oral argument.
16 While I understand Mr. Hibey disagrees I think we have
17 thoroughly discussed this.

18 CHAIRMAN FARRAR: All right. Mr. Hibey,
19 my concern is -- Well, among our concerns is we'd like
20 to get some idea of how long this hearing is going to
21 be. Before we know what the issues are, we don't know
22 how long the hearing is, we don't know how long to
23 allow for depositions because we don't know how many
24 there will be. So somewhere sometime soon, we have to
25 get our arms around this.

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1 You know what (Audio breakup.) case is
2 going to be. You know what your case is going to be
3 but the staff doesn't know what your case is going to
4 be. How can we proceed with depositions and with
5 allocating trial time without something being supplied
6 perhaps by both parties in terms of an outline in the
7 case, maybe pretrial brief. We were envisioning a
8 pretrial brief later, but there has to be something
9 that the parties are doing to file now that let's us
10 make sure that we put our deposition time to best use.

11 MR. HIBEY: Your Honor, my colleagues are
12 asking me to take another time out. Would you indulge
13 us?

14 CHAIRMAN FARRAR: Yes. Go ahead.

15 MR. HIBEY: Thank you.

16 (Discussion held off the record.)

17 MR. HIBEY: Back on the air, Your Honor.

18 CHAIRMAN FARRAR: Go ahead.

19 MR. HIBEY: There are a number of things
20 that I would want to say, that I will say. The order
21 of them may not be ideal but I guess that's the
22 challenge at this point to make it comprehensible.
23 This case is as far as we're concerned simple in one
24 respect. It asks the question of what did David
25 Geisen know and intend with respect to statements that

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1 FENOC made to the NRC during the fall period of 2001.

2 That's point one.

3 Point two, the notion that we need to take
4 extraordinary lengths to discuss the science behind
5 the operation of a nuclear reactor and various
6 processes that may degrade the operation of a nuclear
7 reactor is our view secondary to that one issue which
8 the staff simply must address. In that regard because
9 this is an enforcement action that I don't need to
10 describe further because we understand what's at stake
11 in this enforcement action, I believe it's appropriate
12 to ask in the first instance the staff how long they
13 expect their case is going to take. I will tell you
14 we are going to cross examine most if not all of the
15 people who take the stand and we are going to be
16 uniquely focused on what they know regarding Mr.
17 Geisen's conduct.

18 So the question of how long it's going to
19 take to try this case I think today is most
20 appropriately directed in the first instance to the
21 staff and once we understand how many days they think
22 it will take and as discovery progresses and they
23 identify in whatever pretrial disclosure requirements
24 there are as to how many witnesses they are actually
25 going to call in their case in chief, we may be able

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1 then to tell you how long we're going to take once
2 those witnesses hit the stand.

3 In terms of what witnesses we might call,
4 I have to stress it's a question of whom we might call
5 only because we have to make judgments about whether
6 there are any witnesses to call and we ruled out Mr.
7 Geisen in the light of whatever the testimony is that
8 comes forward in the case. This is a case that I
9 respectfully suggest is very different than what I
10 speculate since I have no experience. It's the kind
11 of case normally heard before a panel where it is
12 dense with science and where matters need to be
13 discussed in scientific depth beyond anything that I
14 could almost imagine.

15 But it is not a matter of imagination to
16 say that this case is not going to be steeped in
17 science. This is a case involving conduct and it is
18 not the conduct of FENOC and it is not the conduct of
19 others. It is the conduct of one man that is the
20 subject of the case and ultimately of the
21 deliberations the panel will have to take.

22 So in short, I don't know how long it's
23 going to take but I know this. We are going to be
24 fastidious in our focus on what we think is the
25 question of what Mr. Geisen's conduct was, what his

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1 knowledge, what his intent was in connection with the
2 statements that FENOC made to the NRC.

3 CHAIRMAN FARRAR: Thank you, Mr. Hibey.
4 Ms. Clark, would you respond to that please?

5 MS. CLARK: Yes. Thank you. Let me start
6 with what I think we need to get from Mr. Hibey before
7 we begin the next phase of our discovery and that is
8 what we've been talking about in terms of our
9 preclusion order. We need a specific identification
10 of their claims and defenses. We need a specific
11 identification of any witnesses that they will or may
12 call and we need a specific statement as to any facts
13 that they wish to present at hearing. This needs to
14 be provided before the end of written discovery. So
15 the very discussion we just had which is that Mr.
16 Hibey wants to wait until we present our case before
17 he makes these decisions is precisely the thing that
18 we have stated cannot and should not be permitted.

19 Now in terms of how I see the proceedings
20 going forward, I don't of course at this time want to
21 get into all of the elements that we need to establish
22 to go forward with our case, but I can tell you that
23 it seems to me that the science is fundamental here.
24 The thing that happened, the event that happened, was
25 a corrosion event involving the vessel.

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1 CHAIRMAN FARRAR: Let me interrupt. If
2 you were the Department of Justice telling the
3 District Judge what they had to present to enlighten
4 the jury so the jury would understand the gravity of
5 what they were going to hear Mr. Geisen did I would
6 understand that.

7 MS. CLARK: Right.

8 CHAIRMAN FARRAR: There's the corrosion
9 problem and the role of the pressure vessel and so
10 forth. These are not things that are foreign to us
11 and that's why Congress established a board like this
12 and so I'm not sure that we don't come into the case,
13 even the legal judges, having a fairly -- Certain
14 Judge Trikouros understands that better than anybody
15 on the call.

16 MS. CLARK: If I may say and believe me.
17 I have all due respect for the technical understanding
18 that you have. I will tell you that I have been
19 working with our expert and the difficulty in this
20 case, and you're correct, that understanding the
21 corrosion event is not that complex. The problem is
22 the knowledge that Mr. Geisen had was derived by
23 things like looking at video tapes, looking at
24 photographs. The submittals involved have statements,
25 tables with nozzle designations. In many respects,

1 the way that these things have to be demonstrated to
2 be incorrect is by comparing the actual video tapes
3 with the nozzle designations and by identifying the
4 locations where the corrosion occurred and was
5 observed with the submittals that were provided and
6 that actually is quite a complex task. I can tell you
7 that my expert has been working on this extensively
8 for weeks and it is not -- That technical aspect is
9 actually quite complex.

10 CHAIRMAN FARRAR: All right. If it were
11 Mr. Hibey's turn to speak now, he would say you don't
12 need to know my specific defenses in order to put on
13 that presentation that you think perhaps correctly
14 that we need to hear in order to understand the case.
15 So if I could paraphrase the points he made why if
16 this is just a matter of putting on the case that you
17 think demonstrates that Mr. Geisen did whatever it is
18 precisely it is you claim he did and do it very
19 thoroughly, maybe you'll do it at greater length than
20 might have been necessary if you knew the precise
21 defenses. But you need to establish all the elements
22 of what happened. Your people believed several years
23 ago that those things were done. Why not just put on
24 the case?

25 MS. CLARK: What I've been talking about

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1 is the science and I think we need to present that
2 regardless of whether he presents any defenses at all.
3 But there is an additional factor which is what Mr.
4 Hibey was talking about. Once you get beyond the
5 science then you also have to establish a number of
6 elements with regard to Mr. Geisen himself, his
7 specific knowledge, his intent, his actions, all those
8 things that we were talking about have to be
9 established as well and those are the things that we
10 are interested in getting his position on and those
11 are the items that we will have to call fact witnesses
12 for and we don't know -- We will know better what fact
13 witnesses we need to depose and present at hearing if
14 we can ascertain from him what defenses and claims he
15 intends to present.

16 CHAIRMAN FARRAR: Let us go off the record
17 a minute here.

18 (Whereupon, at 3:55 p.m., the above-
19 entitled matter recessed and reconvened at 3:57 p.m.)

20 CHAIRMAN FARRAR: All right. We are back
21 on the record. Ms. Clark, were you finished?

22 MS. CLARK: Yes, Your Honor.

23 CHAIRMAN FARRAR: Mr. Hibey.

24 MR. HIBEY: We're getting down into the
25 weeds of the merits here but you know I'm just looking

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1 at their response to interrogatory number 13 and I
2 wonder what they perceive to be their burden of proof
3 and what was the burden of proof that they were
4 addressing at the time they took his livelihood away
5 from him because in the response to interrogatory
6 number 13 the NRC says "the information that reveals
7 each word or text Mr. Geisen may have written,
8 inserted, added, proposed, revised or deleted relating
9 to FENOC September 4th written response to the
10 bullet," that's the first response, "is not within the
11 knowledge of the staff" and yet they take his
12 livelihood from him. Now they're arguing we have this
13 weakness and the only way to strength it is for Mr.
14 Geisen to provide us with all of this information that
15 we're missing. I mean this doesn't even come close to
16 addressing their burdens in this case and I think it
17 gives you some sense of how they intend to attempt to
18 role in all of this science, none of which they're
19 going to be able to tie back to Mr. Geisen in any
20 meaningful way.

21 CHAIRMAN FARRAR: Let's --

22 MR. HIBEY: That's why this is a cross
23 examination case.

24 CHAIRMAN FARRAR: All right. Let's do
25 this. Mr. Hibey, in your proposal of a schedule you

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1 had some activities on December 15th about your list
2 of defenses and so we don't -- in the shortened
3 proceedings we have no problem giving the invocation
4 of the Fifth Amendment privilege with you signing
5 things rather than Mr. Geisen and that is not in any
6 way a waiver of -- We will not construe it as a waiver
7 of Mr. Geisen's rights.

8 Your statement of here's what you plan to
9 do at the trial, why don't we have you present that.
10 I'm not sure the 15th is exactly the correct date.
11 We'll get to that in a minute since we've had some
12 other events happen here today. But I'd like -- If
13 the Board were to direct you to do that and direct
14 both parties to direct you to do it in a way that we
15 didn't have to hear about this issue again, that being
16 either from you or Ms. Clark. Is that something you
17 can do in other words?

18 MR. HIBEY: We're certainly motivated to
19 do it. We will -- If our instructions are to meet the
20 deadline of the 15th of December to provide that which
21 is set forth in our proposed schedule, we will do
22 that, Your Honor.

23 CHAIRMAN FARRAR: Leave out the date for
24 now because some other things have happened today, but
25 this is something we would like you to do and do as

1 thoroughly as you can so that we don't have hear about
2 this again. And again the reason I keep saying about
3 us not wanting to hear about things is the more we
4 hear about things the more painful rulings we have to
5 cogitated over and write about, the less expedited
6 your testimony gets.

7 I don't say that as a threat. It's just
8 a matter of fact that the more we have to resolve all
9 these preliminary skirmishing items the longer it
10 takes and the less chance we have of delivering on the
11 expedition that we're committed to. And if we don't
12 finish our trial sometime in advance of April 16th,
13 then we'll be gone for I assume several months.

14 MS. CLARK: Your Honor, in the interest of
15 preventing additional filings, I would like to make it
16 very clear that staff's position is that Mr. Hibey's
17 proposal that he provide claims and defenses that are
18 signed by counsel only is not in our view a sufficient
19 statement of claims and defenses prevent preclusion.
20 We believe that we need discovery responses.

21 CHAIRMAN FARRAR: Yes, I'm not ruling that
22 out now. We have not -- We've a lot of questions to
23 give us background and context for the proceeding, but
24 we have not ruled out additional discovery responses.
25 But we have agreed upon ourselves that as to certain

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1 things a response from Mr. Hibey as counsel is all
2 you're going to get. You're not going to get
3 something from Mr. Geisen himself. So for example, on
4 this item that's listed under December 15th, you're
5 going to get that from counsel. Now when we get back
6 to the pending discovery responses some of which may
7 have been muted by the earlier discussions, we'll get
8 into who they should be from.

9 MS. CLARK: Okay.

10 CHAIRMAN FARRAR: Let's go off the record
11 just a moment while the Board confers. Before we do
12 that, one other question. Is this a one-phase trial
13 where we do liability and in assuming there's
14 liability we look at the penalty at the same time or
15 is this a two-phase where we do liability and only if
16 there's liability do we then have an additional mini-
17 hearing about penalty?

18 MR. HIBEY: I think it's a unitary trial.
19 I think you can address all the issues at one time.

20 CHAIRMAN FARRAR: Ms. Clark. Did you hear
21 my question?

22 MS. CLARK: Yes. I'm sorry, Your Honor.
23 In fact, I think it makes more sense probably to make
24 this a one-stage trial because the sanction is
25 inextricably linked to the significance which is of

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1 the event.

2 CHAIRMAN FARRAR: Okay. That's fine. As
3 long as you both -- We didn't have any strong feeling
4 going in and that's fine with us. Then give us a
5 moment here to confer. Off the record.

6 (Whereupon, at 4:05 p.m., the above-
7 entitled matter recessed and reconvened at 4:08 p.m.)

8 CHAIRMAN FARRAR: On the record. All
9 right. I think we're prepared then with some very
10 long preliminary discussion but very helpful. Let's
11 take a look at the specific matters in front of us,
12 Ms. Clark, where you have to the 15th to file your
13 motion on the November 29th filings. Mr. Geisen and
14 his counsel are going to go back and look at all the
15 previous interrogatories. Ms. Clark, we will have
16 them do that in response to your motion of December
17 1st, the motion to compel, and at the end of that
18 today, you need to file another motion.

19 We will do that, but we're hopeful of
20 getting all these discovery motions involved before
21 Christmas. What we will do to the extent possible is
22 just give you these rulings without any reasons that
23 just says this is granted, this is denied, just in the
24 interest of not wasting time. Just a second.

25 (Pause.)

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1 CHAIRMAN FARRAR: We're back. Mr. Hibey,
2 you're going to file by December 12th. No, you were
3 going to do by the 12th the redo of the Fifth
4 Amendment claims. When can you do the tasks that were
5 now listed as the 15th? Is the 15th still a good date
6 to get that in by?

7 MR. McALBER: Your Honor, this is Chas
8 McAlber. We would like to try to keep to this
9 schedule. May we shoot for that and if there is some
10 reason why there is -- we'll need a little bit more
11 time, may we ask or at least petition the Board for
12 it? But we're going to try to stick to these dates to
13 try to get this thing moving along.

14 CHAIRMAN FARRAR: Okay. Good. If you
15 need to file a motion make it very short. Just say
16 you need X more time.

17 MR. McALBER: But we will certainly try to
18 meet the 15th.

19 CHAIRMAN FARRAR: All right. On this
20 notion --

21 MR. McALBER: Your Honor, this is Chas
22 McAlber again. In the schedule, we had asked, we had
23 included a date as well for staff to supplement their
24 discovery responses with facts, witnesses and
25 documents. We have -- The staff is aware from a very

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1 detailed letter that we sent them where those details
2 are not present in their current or existing discovery
3 responses and so given the fact that both staff and we
4 had this event in both of our proposed calendars, I
5 was wondering whether the Board is going to include
6 that date as well for staff to make its supplemental
7 filing.

8 PARTICIPANT: The date?

9 MR. McALBER: December 15th, the same
10 date, Your Honor.

11 CHAIRMAN FARRAR: Ms. Clark, what do you
12 think about that?

13 MS. CLARK: Well, before we make any more
14 rulings, I did get a letter from Mr. McAlber but it is
15 not my position that we need to provide any additional
16 discovery. Certainly we will supplement our discovery
17 as we are required to do. But it's our position that
18 we have provided adequate discovery responses.

19 MR. McALBER: That's certainly -- by the
20 discovery responses, Your Honor, which we've detailed
21 those to Ms. Clark. Ms. Clark, if they've included it
22 in their schedule to update their discovery responses
23 on December 15th. Apparently Ms. Clark is no longer
24 willing to do that.

25 MS. CLARK: What I believe I just said was

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1 that we will supplement our discovery as we are
2 required to do so, but I am not conceding that our
3 discovery was inadequate and needs to be corrected
4 which is I believe what you're trying to establish
5 here.

6 CHAIRMAN FARRAR: Did you say, Mr.
7 McAlber, that this was embodied in a letter you sent?

8 MR. McALBER: Yes, Your Honor.

9 MS. CLARK: At 6:00 p.m. on November 30th.

10 MR. McALBER: It was sent on November
11 30th, Your Honor.

12 CHAIRMAN FARRAR: Ms. Clark, why don't you
13 look -- Did someone give us that letter recently? Was
14 that one of those attachments?

15 MR. McALBER: I would be glad to make it
16 available to Your Honor. I'll send that to the Board.

17 CHAIRMAN FARRAR: Okay. Why don't you
18 send us that? Ms. Clark, why don't you do this? Why
19 don't you look at that letter and let's change that
20 date from the 15th to three days after the Geisen
21 response that's now going to be filed on the 15th.
22 You can see how forthcoming that is and in that spirit
23 three days later. Whether it's the 15th or some other
24 date, you file a response that supplements your
25 discovery and that responds to such portions of the

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1 November 30th letter that you think at that time are
2 appropriate to respond to.

3 MS. CLARK: We can set that. I am
4 prepared to file that probably this week actually, a
5 response to Mr. McAlber's letter. I've already been
6 drafting it.

7 MR. McALBER: I believe that -- Was Your
8 Honor talking about supplemental discovery responses
9 rather than just a response to a letter?

10 CHAIRMAN FARRAR: I thought they were tied
11 into together.

12 MR. McALBER: Well, the letter identifies
13 the areas of the discovery responses where information
14 was lacking and we'd be interested in the substantive
15 information that cures those gaps.

16 CHAIRMAN FARRAR: Ms. Clark, if you can do
17 that this week, that would be great.

18 MS. CLARK: I expect I should be able to
19 get a response by the end of this week.

20 CHAIRMAN FARRAR: Okay. In terms of
21 setting the rest of the schedule, we will allow the
22 staff to file pre-filed written testimony, background
23 information about corrosion and the whole of the
24 reactor pressure vessel and so forth which I take it
25 would more of a generic tutorial kind of thing. But

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1 as far as everything else in the case including
2 testimony about how the videos relate to what was
3 submitted and so forth, we think in this kind of case
4 it would better to go through all of that orally in
5 terms of the presentations.

6 But that being said, then we need more
7 thorough rather than less thorough pretrial briefs.
8 What I'd like to do is have the pretrial briefs be a
9 head start on your proposed findings of fact and
10 conclusions of law, a nowhere near detailed outline
11 including summaries of what you expect to prove by
12 different witnesses that would allow us to prepare for
13 the case and would be something that you all could
14 build on as the case went along, so you won't need an
15 inordinate amount of time at the end of the case to
16 proposed findings and conclusions and we would not
17 need an inordinate amount of time to render a
18 decision.

19 A little vague. I think we would want
20 those filed simultaneously and in order to assure that
21 they're simultaneous we'll pick a time sometime in the
22 future in when those would filed and you'll send them
23 only to the Board initially and when we get both of
24 them we will forward one to the other so that there's
25 no question of one side being delayed and then being

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1 accused of trying to get it to look at the other sides
2 before they went forward and so forth.

3 ADMIN. JUDGE HAWKENS: This is Judge
4 Hawkens. The Board would expect the trial briefs to
5 be a real roadmap for us with the staff and to the
6 extent that Mr. Hibey intends to provide witnesses
7 would identify the witnesses, break the staff in
8 particular what regulatory violations occur, identify
9 the elements which the staff has to prove by
10 preponderance of the evidence and then explain which
11 element each witness will be supporting and describing
12 with some specificity those facts supporting those
13 elements.

14 CHAIRMAN FARRAR: All right. With having
15 said that, are we prepared -- Oh, it seems to me the
16 more I read your filings where it becomes clear that
17 the major rulings in the case in the most difficult
18 and maybe even the most time consuming ones are going
19 to be preclusion rulings or as I think in Mr. Hibey's
20 proposed schedule the February 28th item, the
21 prehearing motions and any evidentiary objections. I
22 take that's where we'd have the preclusion orders
23 where Mr. Geisen did not provide discovery because he
24 claimed the Fifth and staff will argue that certain
25 kinds of testimony should be precluded. That may not

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1 --
2 Ms. Clark, do you have any better notion
3 today than maybe you had a month or two ago about --
4 Obviously, Mr. Geisen cannot testify and statements
5 that may have made in the past that were favorable to
6 him. What do you think will be precluded? Just his
7 direct and/or rebuttal testimony or would there be
8 other things that would be precluded to achieve
9 fairness after his having invoked the Fifth Amendment
10 privilege?

11 MS. CLARK: Yes, I expect ours would be
12 excluded and also potentially cross examination that
13 goes beyond our case and our direct.

14 CHAIRMAN FARRAR: Wouldn't that ordinarily
15 be precluded anyhow? Oh, I see. In other words,
16 where Mr. Hibey cross examining tries to establish
17 something related -- I'm struggling a little here with
18 what you have in mind.

19 MS. CLARK: Yes. Well, you're right. To
20 the extent he goes beyond direct it would be generally
21 prohibited anyway. But to the extent that he -- I
22 just wanted to caution he would not be permitted to
23 raise new defenses in that way.

24 ADMIN. JUDGE HAWKENS: Judge Hawkens here.
25 He wouldn't be permitted generally from raising new

1 defenses any event. Correct?

2 MS. CLARK: Correct.

3 CHAIRMAN FARRAR: Mr. Hibey, are you in
4 general agreement with what Ms. Clark said?

5 MR. HIBEY: No, only because I don't
6 understand this element of the discussion. But I
7 suppose I'll find out in due course.

8 CHAIRMAN FARRAR: All right. I guess what
9 I'm hoping is we don't save -- My only knowledge of
10 this and how it works is from getting ready for the
11 previous oral argument.

12 MR. HIBEY: Well, that's the basis of any
13 position we would take. We think that preclusion in
14 the circumstances of this case would absolutely
15 destroy any semblance of due process being visited on
16 behalf of Mr. Geisen, something that I think has been
17 zealously protected by the panel.

18 CHAIRMAN FARRAR: Obviously he can't say
19 anything at the hearing.

20 MR. HIBEY: He is not going to say
21 anything at the hearing.

22 CHAIRMAN FARRAR: So we established --

23 MR. HIBEY: That does not -- The
24 preclusion of that would come if somehow in a moment
25 of complete loss of mind I were to get up and say Mr.

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1 Geisen is going to speak. That we can't do. I
2 understand that and we have said he is not going to
3 testify.

4 CHAIRMAN FARRAR: But you are referred to
5 preclusion. You imply preclusion can't go beyond
6 that. What did you think Ms. Clark was urging that
7 went beyond that?

8 MR. HIBEY: Well, again we're in the area
9 of theory now. But if I were to cross examine someone
10 and attack his credibility as of course all cross
11 examination does, questions the credibility of the
12 witness, and if that cross examination were having an
13 effect that was, shall we say, inconsistent with the
14 way that Ms. Clark would like to see things going, the
15 last thing I would want to hear is "Objection, this
16 should be precluded" because as far as I'm concerned,
17 Your Honor, with all due respect, there is no room for
18 preclusion in this case. There is no room because of
19 the fact that this man is under criminal indictment
20 and has a right to protect himself while that
21 condition exists.

22 CHAIRMAN FARRAR: Let me ask a question
23 and again I've said several times none of us here are
24 experts or even have much knowledge at all of criminal
25 practice. Suppose Ms. Clark, and this is purely

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1 hypothetical, puts on a witness who in the course of
2 his testimony says "Well, Mr. Geisen came in and he
3 said this to me" and obviously that was a damaging
4 admission. Mr. Hibey, you would be allowed on cross
5 examination to say "On the next day, didn't Mr. Geisen
6 say to you this" or "Hadn't he previously said to you
7 something else" which would be in the nature of
8 something that was a mitigating statement.

9 MR. HIBEY: Exactly.

10 CHAIRMAN FARRAR: Do you think you would
11 be entitled to ask that question?

12 MR. HIBEY: Absolutely.

13 CHAIRMAN FARRAR: Ms. Clark, do you agree?

14 MS. CLARK: Your Honor, it's difficult to
15 get into the theoretical possibilities here because I
16 think it really depends on the circumstances.

17 CHAIRMAN FARRAR: The reason I'm asking is
18 not to do a brain teaser quiz but for us to
19 understand, try to be sure we understand, what you all
20 are talking about so that we're not met on the eve of
21 the trial with total disagreement that takes forever
22 to resolve.

23 MS. CLARK: Certainly I would say he can
24 explore on cross examination the validity of what the
25 witness is saying. He could absolutely attack

1 credibility. Those are all options. What I don't
2 want him to do is to say "Now that you're here on the
3 stand, let me show you a document here" that nobody
4 has ever seen before "and tell me what you think of
5 this."

6 MR. HIBEY: Wait a minute. First of all,

7 --

8 MS. CLARK: Unless it's for impeachment.
9 That's what I'm saying.

10 MR. HIBEY: I would be disbarred if I ever
11 put a question like that to anybody (1). (2) If
12 you're talking about a rebuttal document, then this
13 has nothing to do with preclusion. This has to do
14 with the application of the rules of evidence and we
15 know that rebuttal documents don't need to be
16 disclosed in advance. So if there is an impeaching
17 document out there and some witness is up there
18 testifying inconsistently with it and he can be
19 associated or strongly identified with that document,
20 then under the rules of evidence, I should have the
21 right to impeach him.

22 MS. CLARK: That's what I consider
23 credibility and I just said that that of course is
24 acceptable. So it's difficult to engage in a
25 theoretical argument. I'm just saying -- Because it

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1 depends on the circumstances. I'm simply saying that
2 you cannot bring up new defenses at the time that we
3 present our witnesses and that's how I see the
4 preclusion order working.

5 CHAIRMAN FARRAR: I think we've gotten as
6 much out of this as my perhaps lame question would
7 justify but I appreciate you both addressing it for
8 us. With all this having been said and since you all
9 will be meeting -- Let's talk about -- What I'd like
10 to do is send you back to the drawing board since we
11 have these changes today and ask you to come up with
12 a new schedule.

13 But the one sticking point between the two
14 of you was when the trial could start. Mr. Geisen
15 wanted it to start on March 5th and I think the staff
16 said it wouldn't be possible to get there until March
17 19th, two weeks later. I'm just trying to get a sense
18 of this. If I guess this is a two week hearing, does
19 anyone think that would be far off?

20 MR. HIBEY: No, Your Honor.

21 MS. CLARK: No, that seems reasonable.

22 CHAIRMAN FARRAR: We don't have to have a
23 decision -- Well, let me ask you this. Both sides
24 have a big team of lawyers working on this. Would it
25 be possible what would ordinarily be an absurdly short

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1 period for you to file proposed findings. I mean is
2 that something that co-counsel could be working on as
3 the case went ahead so that we could have proposed
4 findings and conclusions days or fewer after the end
5 of the trial or not something you'd like?

6 MR. HIBEY: This is Dick Hibey. I'm
7 loathe to make commitments about the generation of a
8 document of that sort without consulting with all of
9 my colleagues and I have to say that two of them had
10 to leave the room in order for us to meet a pleading
11 deadline in the criminal case in Toledo tonight. But
12 I can say that right after this trial, I mean after
13 the hearing, in front of the Board we're probably
14 going to be spending a fair amount of time in Toledo
15 in advance of the trial setting up and probably having
16 pretrial and in limine motions in that case.

17 I'm concerned about our ability to
18 generate the kind of document that would be helpful to
19 the panel if indeed findings of fact and conclusions
20 of law must precede the panel's ruling. If the panel
21 ruled -- Well, I don't want to get involved too deeply
22 in the order in which you folks do things. You just
23 have to tell me. If you're saying you want a post
24 trial findings of fact and conclusions of law
25 immediately after or shortly after the hearing, then

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1 about the only thing I could say realistically that
2 would be that that's another reason for having the
3 trial behind around the 5th of March.

4 CHAIRMAN FARRAR: Mr. Hibey, let me
5 interrupt you. Are you suggesting the possibility
6 that at the end of the trial either right then on the
7 spot or three or four days later we'd call you and say
8 we've been thinking about this. We don't have any
9 formal reasons but we know that one side or the other
10 prevailed and that we believe their witnesses or there
11 is an explanation or this clearly happened and then
12 just ask the party that prevailed to file proposed
13 findings that would help us commit our internal
14 reasoning to writing.

15 MR. HIBEY: I have done that, Your Honor,
16 in Federal court.

17 CHAIRMAN FARRAR: You have.

18 MR. HIBEY: Yes.

19 CHAIRMAN FARRAR: Okay. We were
20 envisioning the standard sort of thing that you guys
21 give us something, we use that to help us reach a
22 judgment and then maybe perhaps in this case -- The
23 reason we were asking is we were thinking maybe in
24 this case as opposed to some of the predictions of
25 future science kind of cases that we could issue a

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1 decision sooner rather than later based on the
2 proposed findings of fact of the party whose case was
3 most convincing.

4 MR. HIBEY: Yes, I think, Your Honor, it
5 would be an appropriate alternative to the one that
6 you are all usually accustomed to doing because as I
7 said earlier, this is, I'll call it, a conduct case,
8 an integrity case. It is not a scientific case that
9 requires a tremendous amount of scientific data and
10 pondering by a highly specialized court, I mean, one
11 that has someone peculiarly skilled in nuclear science
12 and engineering. This is did he do it or didn't he do
13 it kind of case to be honest with you and so you may
14 not need to go through the processes that you're more
15 accustomed to and thereby render a verdict, a
16 decision, more expeditious or more promptly than
17 you're used to.

18 CHAIRMAN FARRAR: Why don't you do this,
19 and, Ms. Clark, you do the same thing? Talk to your
20 team and see what you think the possibility, that Mr.
21 Hibey indicated he could if his people were there, of
22 getting us proposed findings that you would have to be
23 writing them as the case went along as quickly and use
24 them to enter a decision quickly.

25 Now if nobody wants to do that, then all

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1 we have to worry about is let you all head out to
2 Toledo.

3 MR. HIBEY: How you want to deliver your
4 verdict: Yes.

5 CHAIRMAN FARRAR: Just get to it
6 eventually. I think the big thing is get the trial
7 done before you all go to Toledo and then go from
8 there. But if you all would talk about our proposal
9 which is that you do proposed findings as you go along
10 and file them in short order and Mr. Hibey's proposal
11 which is we render a decision without the proposed
12 findings, write a few paragraphs that we believe Dr.
13 Jones and didn't believe Dr. Smith and you could then
14 cast proposed findings in line with our overarching
15 findings about who was credible and so forth.

16 Why you all do that and then see if you
17 can't come back to us with a consolidated trial
18 schedule and I'm noticing if we started on the 12th of
19 March we could have three weeks of trial and be done
20 by the 30th. That would be two full work weeks before
21 you all went to Toledo. The faster we could start the
22 happier the Board would be. Do you think you both
23 have enough from this conference today and enough
24 about our thinking and each other's thinking to go
25 back and come up with a consolidated or an agreed upon

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1 schedule given the rule and the steps that we've taken
2 today and the indication that we've given about
3 testimony?

4 MS. CLARK: Yes. Your Honor, I believe
5 that we certainly have more information and we can
6 certainly try to see if we can come to an agreed
7 schedule.

8 MR. McALBER: Certainly, Your Honor. This
9 is Chas McAlber. I will be happy to chat with Ms.
10 Clark about that and see if we can get even the
11 remaining issues wrapped up.

12 MR. HIBEY: Your Honor, may I inquire with
13 respect to the panel's disposition regarding a
14 starting date for the date because there's a two week
15 spread there and there's this business of putting in
16 findings of fact and conclusions of law. I see the
17 two as related.

18 CHAIRMAN FARRAR: Right. What I had just
19 said a moment ago was if we start on the 12th which is
20 halfway in between each of your proposals that would
21 give us three weeks to complete a trial by the 30th.
22 But we're happy to start to the 5th if we can do it
23 and if that would allow you to get the proposed
24 findings. If both sides agree to that, then we would
25 prefer to start the 5th and try to wrap, get the trial

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1 over, and even if it was three weeks and you could
2 file proposed findings the week later by the 30th and
3 you all go to Toledo for two weeks and we get a
4 decision out or of course, the alternative is that we
5 issue a decision that just says "Here's our general
6 overarching findings in terms of credibility and
7 conduct and so forth. Winning side, please submit to
8 us proposed findings."

9 I don't like doing that because I think
10 boards generally and I know my own predilection is I
11 don't like to say something unless the parties know,
12 I don't like to issue a ruling unless the parties know
13 why we're doing that. The parties are entitled to
14 know that.

15 MR. HIBEY: Very well.

16 CHAIRMAN FARRAR: It's a key part of who
17 we are.

18 MR. HIBEY: Yes, indeed and I recognize
19 that. That's why I'm not saying anything more. So we
20 will respond in the light of what you just said.

21 CHAIRMAN FARRAR: Is there any other
22 business that we neglected to take care of or that has
23 come up in the meantime?

24 MS. CLARK: Not from the staff.

25 MR. HIBEY: Not from our side either.

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1 CHAIRMAN FARRAR: Thank you. This was a
2 long but necessary call. I think we made a lot of
3 progress. I was afraid the train was running off the
4 tracks that we'd be caught up in big clean-up, big and
5 lengthy clean-up operation, but I think you all can
6 put this together now and we'll act accordingly. So
7 thank you all and we'll be on call whenever you need
8 us.

9 MS. CLARK: Thank you.

10 MR. HIBEY: Thank you.

11 CHAIRMAN FARRAR: Off the record.

12 (Whereupon, at 4:41 p.m., the above-
13 entitled matter was concluded.)
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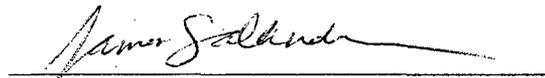
Name of Proceeding: Pre-Hearing Conference

ITMO David Geisen

Docket Number: IA-05-052

Location: (Telephone conference)

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.


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