

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Hearing ITMO David Geisen

Docket Number: IA-05-052

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USNRC

December 26, 2006 (4:02pm)

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TEMPLATE = SECY-032

SECY-02

## 1 UNITED STATES OF AMERICA

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## 3 NUCLEAR REGULATORY COMMISSION

4 + + + + +

## 5 ATOMIC SAFETY AND LICENSING BOARD (ASLB)

6 + + + + +

## 7 TELECONFERENCE

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9  
10 -----x

11 In the Matter of: :

12 DAVID GEISEN : Docket Number:

13 (Enforcement Action) : IA-05-052

14 -----x

15  
16 Wednesday,

17 December 20, 2006

18  
19 The above-entitled matter came on for  
20 hearing, pursuant to notice, at 10:00 a.m.21 BEFORE:

22 MICHAEL C. FARRAR, Chair

23 E. ROY HAWKENS, Administrative Judge

24 NICHOLAS G. TRIKOUROS, Administrative Judge

25  
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1     APPEARANCES:

2             On Behalf of David Geisen:

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4                     RICHARD A. HIBEY, ESQ.

5                     ANDREW T. WISE, ESQ.

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

(10:00 a.m.)

JUDGE FARRAR: This is another in a series of prehearing conferences in the Geisen enforcement proceeding. This is Mike Farrar. I'm the Chairman of the Licensing Board. With me at headquarters is Roy Hawken, one of my Associate Judges, and we have on the phone line Judge Nick Trikouros.

For Mr. Geisen?

MR. McALEER: For Mr. Geisen, this is Charles McAleer, and with me Richard Hibey, Andrew Wise, and Matthew Reinhard.

JUDGE FARRAR: All right. We welcome you all, as usual.

Ms. Clark?

MS. CLARK: Yes. For the staff, Lisa Clark. I'm here with Mary Baty, Michael Clark, Brad Klukan, and Michael Spencer.

JUDGE FARRAR: All right. Then, I think that's everybody we need. As we said in one of -- well, first off, you all filed a large number of documents on Friday evening, which we appreciate, particularly the joint schedule, which I think is, one, very helpful, and is about as aggressive as you can get. So I compliment you on that.

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1 As we said in our e-mail, the purpose of  
2 this call is to iron out several details concerning  
3 that schedule, to define more precisely some of the  
4 activities called for by that schedule, and to explore  
5 certain matters not covered by the schedule.

6 Let me start at the end. I take it the  
7 reason you said the no later than Friday, March 30th,  
8 for you to file your proposed findings of fact and  
9 conclusions of law is to make sure you had two full  
10 work weeks reserved before the criminal trial starts?

11 MR. McALEER: Yes, Your Honor.

12 JUDGE FARRAR: Okay. So, really, that  
13 Friday, March 30th, then, is essentially a drop-dead  
14 date that we really ought to try to respect. In terms  
15 of the criminal trial, is there anything new on the  
16 status? The last we heard was a Monday, April 17th  
17 trial date, with a fallback in July, but a number of  
18 pending motions. Any action yet on the motions?

19 MR. McALEER: No. No, Your Honor.

20 JUDGE FARRAR: Any indication that in the  
21 court's mind you're not going ahead on April 17th?

22 MR. McALEER: No, Your Honor.

23 JUDGE FARRAR: Okay. And, Mr. McAleer,  
24 Mr. Hibey, we've touched on this point before, but how  
25 -- and I ask this question because it's important to

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1       how we structure some of the events before March 30th.  
2       How important, if at all, is it to you that we have a  
3       decision out by Friday, April 13th?

4               MR. McALEER:   Your Honor, it would be  
5       important to us, because it might have an impact on  
6       what follows in April.

7               JUDGE FARRAR:  All right.  I take it, Ms.  
8       Clark, it wouldn't make a whole lot of difference to  
9       you, since if you win it's not something -- I don't  
10      think under the collateral estoppel doctrines it's  
11      something you could put to use, or your colleagues at  
12      the Justice Department could put to use in the  
13      criminal trial.

14              MS. CLARK:  That's correct.

15              JUDGE FARRAR:  Okay.  Well, let's talk  
16      today.  Obviously, we cannot give you any commitment  
17      that we would have a decision by then.  It depends how  
18      the trial goes, how well you inform us, how good your  
19      proposed findings are, and how difficult the factual  
20      or other determinations turn out to be.  But we will  
21      have that in the back of our mind as something we  
22      would prefer to do, if we could -- that is, reach a  
23      decision by Friday, April 13th, but that's going to  
24      take some more work on everyone's part, long before  
25      that date.

1           Let's, then, start at the beginning of the  
2           schedule. Yesterday was the date to file -- for Mr.  
3           Geisen to file a response to the staff's motion to  
4           compel. The parties agreed that it was moot by a more  
5           recent filing by Mr. Geisen, and we sent you an e-mail  
6           saying we would accept that determination and issue a  
7           ruling, which we'll do orally now and incorporate in  
8           some writing in due course, that that motion is  
9           dismissed as moot, the result being sought having  
10          essentially been reached by the later filing.

11           Now you all have a Friday, December 22nd  
12          date -- that's two days from now -- to file any  
13          motions regarding those filings of last Friday night.  
14          Do both parties intend to file something? Mr. Hibey?  
15          Or Mr. McAleer?

16           MR. McALEER: Your Honor, we do not intend  
17          at this time to file anything. If that changes, we'll  
18          let staff know. But at this point, we don't intend  
19          to.

20           JUDGE FARRAR: How about the staff?

21           MS. CLARK: The staff -- I'm not certain,  
22          but it is possible that we may file on Friday.

23           JUDGE FARRAR: All right. If you do file,  
24          then, or if Mr. Geisen changes his mind and they file,  
25          let's have replies in by the following Friday, the

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1 29th. And if you can't make that, and any of the  
2 partners, or more likely any associates who aren't  
3 here to defend themselves, if they have to work before  
4 New Year's, you can -- we'll consider Friday to mean  
5 any time before the end of the holiday weekend.

6 But if you're going to take longer than  
7 Friday, please send us an e-mail that says when you  
8 expect them to be filed. And we will make every  
9 effort to get you a ruling by the following Friday,  
10 the 5th, because that would allow you to meet your  
11 date about all written discovery compliance complete  
12 by Monday, the 15th. Does that make sense to  
13 everybody?

14 MR. McALEER: It does, Your Honor.

15 JUDGE FARRAR: Okay. Ms. Clark?

16 MS. CLARK: Yes. And I'm just looking at  
17 the schedule. It says here file motion to compel  
18 concerning November 29, 2006, document production. I  
19 just want to make it clear that we would be filing  
20 motions regarding the number of motions that came in  
21 on the 15th on behalf of Mr. Geisen, which would be  
22 the statement of defenses and supplemental responses  
23 to interrogatories and supplemental responses to  
24 requests for admissions.

25 JUDGE FARRAR: Okay. So you will be

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1 filing, challenging his December 15th filings. How  
2 about his November 29th production?

3 MS. CLARK: We were intending to file --  
4 we're still in discussions with counsel on that  
5 production.

6 JUDGE FARRAR: Okay. But you would -- if  
7 those productions -- or if those discussions are not  
8 fruitful, you would also file by this Friday?

9 MS. CLARK: Yes. So we intend to file for  
10 any -- any of those motions would be on Friday.

11 JUDGE FARRAR: All right. Good. Thanks  
12 for reminding me of that. We will, then -- and the  
13 same thing, any replies would be due the 29th, and  
14 we'll get you a ruling or make every effort to get you  
15 a ruling by Friday, the 5th, so that by Monday, the  
16 15th, which I believe is a federal holiday, all of the  
17 written discovery compliance would be complete.

18 Before we move into the next phase after  
19 that, was anybody thinking about summary disposition  
20 -- filing summary disposition motions on any part of  
21 the case?

22 MS. CLARK: Not the staff.

23 JUDGE FARRAR: Mr. McAleer? Mr. Hibey?

24 MR. McALEER: Your Honor, at this point,  
25 we are not.

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1 JUDGE FARRAR: All right. It seems to us  
2 that that's a good way to approach this with the very  
3 aggressive schedule that you all have set for  
4 yourselves over the two months after that, the time it  
5 would take you to file a summary disposition motion,  
6 the time it would take your opponents to answer it,  
7 and the time it would take us to deal with it, seems  
8 time we could all spend better somewhere else.

9 And our boards have shown reluctance.  
10 Where there is any kind of factual dispute, our basic  
11 philosophy is -- well, factual dispute or expert  
12 dispute, we have written a number of decisions on this  
13 that we disfavor -- are disinclined to grant summary  
14 disposition motions. If something is that clear that  
15 you think you can win summary disposition, you can  
16 probably accomplish the same purpose in less time by  
17 talking to your opponent and entering into a simple  
18 stipulation, if the facts are that obvious.

19 So why don't we rule now that unless --  
20 that there will be no filing of summary disposition  
21 motions without our prior leave. Does anyone have any  
22 objection to that ruling?

23 MR. McALEER: No, Your Honor.

24 MS. CLARK: No, Your Honor.

25 JUDGE FARRAR: Okay, fine. Then, we will

1 -- no summary disposition motions without prior leave  
2 of the Board.

3 You all have five weeks set for fact and  
4 expert depositions. As we see it, during that period  
5 the Board is sitting here, we have other things to do.  
6 But in terms of preparation, that's five weeks that  
7 we'd like to be putting to good use.

8 We'll later in this conference discuss the  
9 mechanics for filing the official copies of exhibits,  
10 but we'd like you to think about whether on Tuesday,  
11 the 16th, or shortly thereafter -- the 16th of  
12 January, or shortly thereafter, whether you could each  
13 provide us with 5, 10, 20, whatever the key underlying  
14 documents are that you all know are going to be  
15 introduced eventually, provide us unofficial copies of  
16 those exhibits, so that we can begin our preparatory  
17 work and use the five weeks of your depositions for us  
18 to start digging into the exhibits.

19 Ms. Clark, any problem with that?

20 MS. CLARK: No, Your Honor, we can do  
21 that.

22 JUDGE FARRAR: Mr. McAleer? Mr. Hibey?

23 MR. MCALEER: No, Your Honor. That sounds  
24 like a great suggestion.

25 JUDGE FARRAR: Okay. Then, why don't you

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1 all, as you're working together, maybe each come up  
2 with a list of what you would -- you know, don't  
3 overwhelm us, but, you know, you know the case better  
4 than we do. But, you know, I would guess there's 10  
5 to 20 more or less lengthy, more or less crucial  
6 documents, that we're all going to be talking about  
7 all during the trial.

8 So if you would exchange lists with each  
9 other, agree on what you're each going to send us, and  
10 then on the 16th of January give us those exhibits.  
11 And, you know, those will be just unofficial, you  
12 know, kind of a reading list for us, and we'll talk  
13 later in this conference about the official copies.

14 MR. HIBEY: Your Honor, this is Dick  
15 Hibey. We're happy to participate in that kind of  
16 exchange. But it would not be indicative of our  
17 agreement that whatever is submitted by the staff is  
18 admissible as evidence.

19 JUDGE FARRAR: Okay. And --

20 MR. HIBEY: Certainly not at this time of  
21 production.

22 JUDGE FARRAR: Right, right. That's  
23 certainly an understandable position for you to take.  
24 Fortunately, we are -- as I think I've said this  
25 before, we hope we're more intelligent about this

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1 stuff than the average jury would be.

2 And if you don't mind us seeing the  
3 documents, it's the kind of thing that if it later  
4 turns out something is inadmissible, I think we're  
5 perfectly capable of putting it aside and saying,  
6 okay, you know, that's not something we can give any  
7 credence to for whatever reason.

8 MR. HIBEY: I have every confidence that's  
9 the fact. That's the reason why I'm being, shall we  
10 say, audacious enough to say, yes, you might get this,  
11 but we might still be objecting to its admissibility.

12 JUDGE FARRAR: All right. Well, with that  
13 -- I'm glad you mentioned that point, Mr. Hibey. With  
14 that understanding, if you all would go ahead and come  
15 up with the exhibits you think we should see, if there  
16 is one that one of you think for some reason or  
17 another is too dangerous for us to see, then exclude  
18 that, but give us as much as you can, so that we can  
19 be as prepared as we can the moment the trial starts.

20 MR. HIBEY: Yes, sir.

21 JUDGE FARRAR: All right. And that will  
22 be done, say, on Tuesday, the 16th of January.

23 On a collateral matter, dealing with the  
24 location of the case and the run-up to the case, no  
25 one has mentioned any need for the standard kind of

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1 limited appearance statements boards usually entertain  
2 in a reactor licensing case.

3 And no one has talked about any reason,  
4 given that all of the lawyers are here, and that -- in  
5 D.C., and Mr. Geisen no longer lives near the  
6 facility, no one has mentioned having the hearing in  
7 Ohio rather than at our headquarters courtroom.

8 Mr. Hibey, Mr. McAleer, what's your  
9 preference?

10 MR. HIBEY: We're going to be spending  
11 enough time in Ohio.

12 JUDGE FARRAR: All right. That's true.

13 MR. HIBEY: We'd be pleased to remain  
14 right here in the east.

15 JUDGE FARRAR: Any need for the Board to  
16 go out there and have limited appearance statements?  
17 I suppose the fact that if someone is interested in  
18 what we're doing, the press can come here, and the  
19 public can go watch the criminal case. So, Mr. Hibey,  
20 would you see any need for limited appearance  
21 statements?

22 MR. HIBEY: Your Honor, I have to confess  
23 that I don't know what a limited appearance statement  
24 is.

25 JUDGE FARRAR: Well, no comment there.

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1 Those are statements that, before we have a hearing  
2 out in the field, citizens are allowed to come in and  
3 state their position on the pending licensing action.  
4 They aren't evidence, and we tell them they have to  
5 stick to the issues in the case, which they frequently  
6 do not do. And the real purpose served is it lets  
7 them express themselves, and occasionally they raise  
8 some issue that the Board says to the parties, "That's  
9 a legitimate question. Make sure your evidence covers  
10 it."

11 Ms. Clark, you are familiar with those, of  
12 course. Do you see any need for them? And where do  
13 you want the trial?

14 MS. CLARK: I don't see any need for  
15 limited appearance statements in this case. And our  
16 preference would be to have the hearing here at the  
17 NRC.

18 JUDGE FARRAR: All right. Then, since the  
19 logistics are infinitely easier here, and you will  
20 have another proceeding out there, we will have it  
21 here. But I think we will make an effort to have our  
22 Public Affairs Office contact those people in the  
23 media who were active in covering the whole Davis-  
24 Besse incident, make sure they know that our trial is  
25 going on, and that they are free to come here and

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1 cover it.

2 In terms of your five weeks for fact and  
3 expert depositions, do you have any idea at this point  
4 how many people you're going to attempt to depose?  
5 Ms. Clark, let's have you go first.

6 MS. CLARK: I believe the staff is going  
7 to depose approximately 10 people, perhaps more.

8 JUDGE FARRAR: Okay. Mr. Hibey? Mr.  
9 McAleer?

10 MR. McALEER: Your Honor, we have not yet  
11 made a determination. At this point, I would highly  
12 doubt that it will be anywhere near that number. It  
13 may be somewhere from zero to five. We're going to  
14 try to run that to ground over the next couple of  
15 weeks, but that's our thinking at this point.

16 JUDGE FARRAR: All right. Then, that's  
17 certainly doable in five weeks, that number of  
18 witnesses, I would think, though we encourage you on  
19 that.

20 JUDGE FARRAR: On Tuesday, February 6th,  
21 there is supposed to be some staff expert disclosures,  
22 and your joint motion mentioned the disagreement on  
23 that. Ms. Clark, can you give us a little more  
24 perhaps than what's said in the joint motion about  
25 what's at stake there?

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1 MS. CLARK: Yes, Your Honor. Our  
2 understanding is that our prefiled testimony will be  
3 essentially sort of the generic testimony regarding  
4 the background in this case. And we intend to file  
5 that in advance of the hearing as well.

6 However, we don't believe that it's  
7 necessary for us for that testimony to provide it both  
8 in advance of the hearing in prefiled form and to  
9 provide an earlier statement regarding the opinions  
10 that will be expressed. We believe that it will  
11 essentially be about generic information, about PWRs,  
12 the corrosion that occurred at Davis-Besse, and that  
13 sort of issue.

14 However, with regard to the matters that  
15 are in contention in this hearing, and those being  
16 matters concerning the actual submittals and why we  
17 contend that they were inaccurate or incomplete, we  
18 would provide an expert statement in advance, so that  
19 counsel for Geisen may have that information before  
20 depositions begin.

21 JUDGE FARRAR: All right. One aspect of  
22 your -- the explanation you just gave us talked about  
23 corrosion at Davis-Besse. Would it be better to have  
24 that generic testimony talk about the corrosion  
25 problem generally or -- we had anticipated, you know,

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1 that this was going to be just a tutorial on what this  
2 problem is all about as opposed to anything related to  
3 the facts at Davis-Besse.

4 But I think you -- what you just said  
5 indicates you would take it a -- I don't know if it's  
6 a baby step or a giant step beyond that. Did I hear  
7 you correctly?

8 MS. CLARK: Yes. Well, I think it's -- we  
9 were going to -- it's generic in the sense that it's  
10 -- the elements of corrosion, the elements of  
11 cracking, and water stresses, those kinds of things.  
12 But we were going to discuss in the generic testimony  
13 just sort of the general information about what events  
14 actually happened at Davis-Besse.

15 JUDGE FARRAR: Mr. Hibey?

16 MR. McALEER: Well, Your Honor, this is  
17 Chaz McAleer.

18 JUDGE FARRAR: Yes, sir.

19 MR. McALEER: Let me first say that, you  
20 know, we were able to work out a substantial number of  
21 issues with staff, and I'm appreciative to staff for  
22 that, relating to this schedule. This is one issue  
23 that both sides just reasonably agreed to disagree on.

24 With respect to the expert testimony --  
25 first of all, let me take that last point. Our

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1 understanding of what the Board ordered on  
2 December 4th regarding the nature of the prefiled  
3 testimony would not be consistent -- was not  
4 consistent with what I just heard as the description  
5 of what staff at this point intends.

6 We understood the Board's ruling, and  
7 drafted the schedule accordingly, to refer to that  
8 testimony as being generic, tutorial testimony. In  
9 administrative proceedings, albeit not in the NRC in  
10 which I participated, that is very scrubbed, very  
11 generic, non-fact related -- not fact and issue  
12 related, and it is simply -- you know, for example, in  
13 the patent context in ITC proceedings describing  
14 technology generally, that may be the subject of the  
15 patent in dispute. And it's really our understanding  
16 that that was what the Board ordered on December 4th.

17 On this issue, really, you know, we on the  
18 Geisen side of the team don't have the ability right  
19 now to be able to assess what it is that the staff is  
20 going to try to include within the prefiled testimony.  
21 And it's really out of that concern that we were  
22 seeking to have some measure of disclosure on  
23 February 6th. And that has implications on a couple  
24 of levels.

25 First of all, it may be -- taking, again,

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1 this example that staff just gave of what they intend  
2 to include in the prefiled testimony -- that we may  
3 have objection to certain elements of the prefiled  
4 testimony, because we don't think it is within the  
5 context of generic or tutorial testimony.

6 Secondly, we need to be in a position when  
7 we do our own expert designation to be able to at  
8 least determine and select an expert who would be able  
9 to address whatever topics staff may intend to raise  
10 in the prefiled testimony.

11 Second, we should be allowed to have at  
12 least a disclosure of some sort regarding the prefiled  
13 testimony, so that we would be able to question the  
14 expert on that during the expert's deposition. I,  
15 frankly, have never seen an expert who has ever been  
16 able to keep anything too generic or too tutorial.

17 There is going to be a basis for the --  
18 whatever the expert says in the prefiled testimony,  
19 and we think, frankly, that is the proper province of  
20 depositions -- to explore exactly the bases for those  
21 opinions and that testimony.

22 And then, finally, for purposes of our own  
23 trial preparation, including preparing our own expert,  
24 preparing for cross examination at trial, we feel we  
25 need to have an advanced disclosure of that. And

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1 getting it on February 22nd, on the same day that both  
2 sides are doing their prehearing statements, filing  
3 those statements and doing their really comprehensive  
4 designation and roadmap for the hearing, we feel it  
5 just comes way too late.

6 I'd make clear with Ms. Clark that I --  
7 you know, I had heard earlier during the December 4th  
8 hearing that they have been working with experts for  
9 some time. Given that fact, I thought it would be  
10 reasonable to ask for disclosure. And, again, we're  
11 talking about a disclosure that's not going to be  
12 occurring until February 6th. I thought it would be  
13 reasonable to have the prefiled testimony within that  
14 disclosure and would not present an undue burden on  
15 staff.

16 The other thing I indicated to her was  
17 that even if prefiled testimony, the actual document  
18 itself was not drafted by February 2nd -- it may well  
19 be, but even if it's not, there is -- there has got to  
20 be some level of disclosure of subject matter, some  
21 description of the anticipated prefiled testimony,  
22 that would enable us, again, to prepare for the  
23 deposition of the expert, to choose our own expert and  
24 prepare that expert, and to prepare for the hearing.

25 So under the circumstances, you know, we

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1 feel it's really not entirely fair to us to leave this  
2 all in the dark until February 22nd, especially if  
3 there are going to be issues such as the one that just  
4 arose regarding matters that the staff may be  
5 intending to include in that prefiled testimony.

6 So out of fairness, we thought a  
7 disclosure of some degree and extent on February 6th  
8 regarding the nature and substance of the anticipated  
9 prefiled testimony would be appropriate and would not  
10 be an unfair burden to the staff.

11 So those are our thoughts on that, and I  
12 will be glad to answer any questions that you may  
13 have.

14 JUDGE FARRAR: Let us see if Ms. Clark has  
15 a response to that.

16 MS. CLARK: Yes. Let me just talk a  
17 little bit about what I would intend to disclose. I  
18 fully agree with Mr. McAleer that he should not be  
19 left in the dark, and that's not my intention. The  
20 fact is we -- the reality is we have a very aggressive  
21 schedule, and in this compressed time to some extent  
22 I'm trying to just see what is realistic for me to  
23 provide and to provide sufficient information.

24 Of course, we will use the same experts  
25 for all of our testimony. So all of the information

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1 -- all of the information that he is discussing will  
2 be disclosed. We will provide, of course, the names  
3 of the experts, all of their qualifications, and so he  
4 will get that information.

5 And as far as opinions that are the basis  
6 for our order, he will get the basis for those  
7 opinions. So my intention, really, is to limit the  
8 prefiled testimony to information about the operation  
9 of a PWR, the nature of the cracking issues that were  
10 known to the NRC, the reason -- you know, and the  
11 issuance of -- that led to the issuance of the bullet,  
12 and their review of the lessons learned task force and  
13 root cause analysis report, and their assessment of  
14 what happened at the plant.

15 Now, I suppose we could provide a brief  
16 statement. I didn't really think that that would be  
17 necessary. I think that information is pretty  
18 obvious, and we would hardly be leaving them in the  
19 dark not to provide those general statements in our  
20 statement. But that was just my intention.

21 JUDGE FARRAR: Hold on a minute.

22 (Whereupon, the proceedings in the  
23 foregoing matter went off the record at  
24 10:31 a.m., and went back on the record  
25 at 10:32 a.m.)

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1 JUDGE FARRAR: Back on the record.

2 Ms. Clark, in that last statement you  
3 made, the list of items you ticked off, those were  
4 things that you had planned to have in the tutorial  
5 testimony on February 22nd?

6 MS. CLARK: Yes, Your Honor.

7 JUDGE FARRAR: But what -- and what would  
8 you provide on February 6th? If that were the list of  
9 items in the tutorial on the 22nd, what would you  
10 provide on the 6th?

11 MS. CLARK: We would provide all of our  
12 testimony on the actual condition of the vessel heard,  
13 as shown by the evidence. And also, all our testimony  
14 concerning the submittal and the presentations that  
15 were made by FENOC, and as to every aspect in which we  
16 claim that they were inaccurate or incomplete.

17 JUDGE FARRAR: All right. I guess the  
18 item that troubles at least me is when you ticked off  
19 those items, the last one was the assessment of what  
20 happened at the plant. And while that might be nice  
21 to see ahead of time, at least from -- speaking only  
22 for myself, that seems to be on the other side of the  
23 line, the line being the things that we wanted to hear  
24 people present their testimony orally as opposed to in  
25 writing. Help me on --

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1 MS. CLARK: Very well. I'd be happy to  
2 provide that.

3 JUDGE FARRAR: Back on December 4th, when  
4 we made -- when we indicated it, if you had given me  
5 those items then, I would have said, okay, the first  
6 few are on one side of the line, and the last one is  
7 on the other. So if that were to be the way all of us  
8 were leaning -- and I'm not sure it is -- what can you  
9 do to help us with that?

10 MS. CLARK: I'd be happy to provide that  
11 orally instead of in the prefiled written testimony.

12 JUDGE FARRAR: Does that, then, Mr.  
13 McAleer, take care of the pending disagreement?

14 MR. McALEER: Well, I -- not necessarily,  
15 Your Honor. But I do -- I must say, I do appreciate  
16 Ms. Clark making that clear, that that won't be part  
17 of the prefiled testimony. My only problem with this  
18 is sitting here on December 20th, and having just  
19 heard the example or the list of topics from NRC staff  
20 just now, I think it is very conceivable that there  
21 may be other issues similar to that that arise,  
22 similar issues on which side of the line the prefiled  
23 testimony is.

24 And one of the just logistical concerns I  
25 have is that if that were to -- there would -- if

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1 there were to be no disclosure on February 6th of the  
2 February 22nd anticipated prefiled testimony, then the  
3 time to deal with objections to the prefiled testimony  
4 and to obtain rulings from the court, especially when  
5 there are going to be a lot of other issues that the  
6 court is going to -- the Board is going to need to  
7 deal with prehearing, it would be very compressed.

8 And it's really -- I mean, I -- my  
9 position, again, is that there ought to be some  
10 disclosure on February 6th of the pretrial -- prefiled  
11 testimony that at least enables us to do those three  
12 things that I mentioned, which is be able to select  
13 our own counterexpert, to prepare for and depose the  
14 expert on those -- on the topics, and to make our own  
15 preparations for examination at the hearing.

16 JUDGE FARRAR: Suppose on February 6th Ms.  
17 Clark gave you an expanded version, she ticked off  
18 five or six items before that last one. Suppose she  
19 gave you a one- or two-page expanded outline on  
20 February 6th of those five or six items that she said  
21 were going to be in the prefiled testimony two weeks  
22 -- 16 days later, would that -- Ms. Clark, is that  
23 something you can do? And, Mr. McAleer, is that  
24 something that would satisfy your concern?

25 MS. CLARK: It's something certainly the

1 staff would be willing to do.

2 MR. McALEER: And, Your Honor, I think  
3 that's a good suggestion. In fact, as I understand  
4 that document, it may be a document that would  
5 potentially surface earlier, any problems with the  
6 scope of the prefiled testimony, and also, as I hear  
7 it, the description of that document, it would inform  
8 the depositions of the experts.

9 So I think if we get that on February 6th,  
10 I think that's a good suggestion and a good solution,  
11 Your Honor.

12 JUDGE FARRAR: All right. Well, thank you  
13 both for agreeing on that and working toward it in our  
14 discussion we just had. So we'll consider that done.  
15 Ms. Clark will file a -- on February 6th, in addition  
16 to the expert disclosures about the oral testimony  
17 that will be provided, a one- or two-page outline of  
18 the matters she just ticked off, not including the  
19 assessment of what happened at the plant, which will  
20 no longer be prefiled. And she will produce that on  
21 February 6th.

22 That gets to what may be the most  
23 difficult part of the case. On Thursday -- well, on  
24 Thursday, February 22nd now, your depositions will be  
25 over. The staff will prefile the tutorial testimony,

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1 and then the parties will file their prehearing  
2 statements, plus exhibits and so forth.

3 We don't have to resolve all that today,  
4 but the more -- the more we can do at that stage the  
5 better. Now is when we get into, how does the Board  
6 get a decision out very rapidly after the hearing?  
7 And the more that's done on February 22nd, the better.

8 We haven't yet come up with what we'd like  
9 in the roadmap. We found in I guess it's the Manual  
10 for Complex Litigation that the Federal Judicial  
11 Center puts out, having each party prepare and submit  
12 a statement listing the facts it intends to establish  
13 at trial, and the supporting evidence. Sometimes,  
14 though, that's viewed as more work than you get a  
15 return.

16 MR. HIBEY: This is Dick Hibey. May I  
17 suggest that while there is a level of complexity  
18 associated with this case, it would not be treated as  
19 a complex case in the federal system. And so some of  
20 the requirements in the Manual for Complex Litigation  
21 might tax a case more than it needs to be taxed,  
22 especially in light of a compressed schedule for  
23 bringing the case forward.

24 The issues remain I think ultimately  
25 relatively simple to articulate having to do with the

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1 conduct of Mr. Geisen. And so I think that you might  
2 have in place already procedural devices for maybe  
3 keying up of those issues that, if complied with,  
4 should give the Panel clear appreciation of what it is  
5 they're going to have to decide.

6 JUDGE FARRAR: Thank you, Mr. Hibey. I  
7 take it from that you really wouldn't like my next  
8 idea, which is the parties file their proposed  
9 findings and conclusions at the beginning of the case,  
10 which I know some courts do.

11 MR. HIBEY: No, I would not.

12 JUDGE FARRAR: Okay. And, again, the only  
13 reason for even thinking about that is that the more  
14 we had ahead of time the better, the faster we could  
15 go at the end. But let's see if we can't approach  
16 that from a different point of view.

17 Ms. Clark, though, do you agree  
18 essentially with Mr. Hibey on the thoughts he  
19 expressed?

20 MS. CLARK: I'm sorry. I'm not -- I'm not  
21 clear about what he was looking for for this roadmap.

22 JUDGE FARRAR: Oh, yes. I think -- yes,  
23 I was suggesting -- well, let's start with the minimum  
24 I think the Board would see for the roadmap is  
25 something that says here are the -- you know, here's

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1 the theory of your case, the principal elements you  
2 expect to prove. That may be a two- or three-page  
3 outline.

4 Then, for each witness who is going to  
5 testify orally, a brief synopsis of that witness'  
6 testimony -- and that may be just a page -- with  
7 emphasis on how that ties into the outline of the  
8 theory of the -- the elements that you've put in the  
9 theory of the case. So when we think roadmap, that to  
10 us is the minimum.

11 What I was suggesting a moment ago was  
12 something going beyond that, and Mr. Hibey has  
13 expressed that he doesn't think that's necessary.  
14 And, second, that given the pressure that's going to  
15 be on all of you from mid-January to mid-February,  
16 that that may be asking a little too much. Do you --  
17 with that understanding, do you agree with his  
18 position?

19 MS. CLARK: I do. I think we could  
20 certainly envision making the kind of roadmap that you  
21 were discussing. I don't think that we would really  
22 have the time, even if we wanted to, to prepare a  
23 complete set of findings by then.

24 JUDGE FARRAR: Okay. Well, let's do this.  
25 Let's leave this that we generally accept the position

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1 you two have just expressed. We'll -- at the  
2 beginning of January -- about how to define that  
3 roadmap a little better, and also get you -- we have  
4 this practice here, which I guess I started after a  
5 bad experience in the private fuel storage case.

6 It was my first case out in Salt Lake, and  
7 all of a sudden the case starts. Somebody introduces,  
8 through a witness, 50 exhibits, which they hand to the  
9 Court Reporter who then starts stamping them. And,  
10 you know, three hour later we resume the trial.

11 So what we've done since then is have the  
12 -- we develop a stamp for you which we give you, you  
13 pre-stamp and pre-number all your documents with your  
14 name and whatever has to be on there. And when you  
15 say you're delivering them to the Court Reporter, we  
16 say, you know, thank you. The Court Reporter will  
17 receive them, but the Court Reporter never actually  
18 touches them.

19 You give them to our Law Clerk, who then  
20 distributes them to us. Oh, no, we already have them  
21 in hand from earlier, and the Law Clerk just uses that  
22 stamp to note when the document was offered and when  
23 it was admitted, and ties that into the later  
24 production of the transcript, leaving the Court  
25 Reporter and the parties to continue the proceeding

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1 rather than stop while the Court Reporter stamps these  
2 numerous documents.

3 So we will get you a description of what  
4 that is, and we'd like to have that done as part of  
5 the February 22nd filing. You would file with us the  
6 requisite number of pre-stamped copies of your  
7 exhibits, and then at the trial the only thing you  
8 have to do is if one of them had a different page or  
9 -- you know, indicate your corrections, but there  
10 would be no actual distribution of documents at the  
11 hearing, and that lets use every minute of the hearing  
12 for productive rather than administrative purposes.

13 So we'll get you the standard form order  
14 on how we do that, and we will provide you the rubber  
15 stamps to do that.

16 Any questions about that?

17 MR. HIBEY: No, Your Honor.

18 JUDGE FARRAR: Okay. So we will tell you  
19 how to do that administrative stuff and what we --  
20 more precisely what we want in the roadmap on  
21 February 22nd.

22 Okay. Then comes the really difficult  
23 part of the case. You want to file prehearing  
24 motions, evidentiary objections, on Wednesday,  
25 February 28th. Our intrepid Law Clerk, Meg Parish,

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1 who is with me now, has previously decided she will  
2 not be here then. She will be delivering her first  
3 baby that day, so good for her. Marsha Carpentier,  
4 who has been here with the Board, will be substituting  
5 for Meg during that period.

6 But it's not just Meg's absence. If you  
7 file those motions on the 28th, and then, as I  
8 understand, we'd have oral argument on March 5th.

9 The real problem is two days before the  
10 hearing we might be making some dramatic rulings on  
11 the scope of evidence, which might leave one party or  
12 the other saying, gee, I thought I was coming in here  
13 with certain ammunition, and now, you know, much of it  
14 has been taken away from me.

15 Is there any way we could learn earlier  
16 about any major objections to the scope of one side or  
17 the other's testimony? I hate to make rulings two  
18 days ahead of time and say, okay, let's go, we've  
19 just, you know, taken your spear away.

20 MR. McALEER: By "earlier," Your Honor,  
21 what is the Board considering?

22 JUDGE FARRAR: Well, I suppose -- well,  
23 you would have -- shame on you for asking that  
24 question. The problem is, as I see, your depositions  
25 aren't over until February 20th. How can you -- I

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1 think behind your question is: how much earlier can  
2 you do it than February 28th? Is that kind of the --  
3 what you were talking about, Mr. McAleer?

4 MR. McALEER: Yes, Your Honor.

5 JUDGE FARRAR: Well, will those kind of  
6 objections be forming up in each other's mind?

7 MR. McALEER: Well, Your Honor, may I  
8 apologize for interrupting, but Mr. -- can we just  
9 have a moment, please?

10 JUDGE FARRAR: Yes. As you can see, you  
11 know, this is not something -- I mean, it's something  
12 that's a concern of ours. And if I had, you know, a  
13 ready solution, I would have laid it on the table. So  
14 anything you can come up with that helps us all deal  
15 with this problem would be useful. So why don't you  
16 all go off and confer and we'll wait for you.

17 MR. McALEER: Thanks for the Board's  
18 indulgence.

19 (Whereupon, the proceedings in the  
20 foregoing matter went off the record at  
21 10:50 a.m., and went back on the record  
22 at 10:52 a.m.)

23 MR. McALEER: Your Honor?

24 JUDGE FARRAR: Yes, go ahead, Mr. McAleer.

25 MR. McALEER: Thanks again. We were

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1 chatting about this, and I think that the Board  
2 certainly faces challenges on resolving this stuff.  
3 But I think the Board has correctly noted that the  
4 parties have an incentive themselves to know what the  
5 scope and nature will be of the evidence they'll be  
6 presenting.

7 Our suggestion, Your Honor, is to have  
8 evidentiary motions, kind of the major type issues  
9 that you're talking about, be filed really on a  
10 rolling basis with the -- if you will the deadline,  
11 the last date for filing such motions, being the 28th  
12 of February.

13 I would anticipate that even during the  
14 course of some of the deposition process, but  
15 certainly immediately after the close of depositions,  
16 the parties would be in a position to file some  
17 motions. And if they are allowed and encouraged to do  
18 them on a rolling basis, then that may ultimately  
19 reduce the amount of paper and issues that come into  
20 the Board on the 28th.

21 It may be that the 28th ultimately becomes  
22 a date for objections and motions specifically tied to  
23 some exhibit issues on the February 22nd designation.  
24 But if we just do the motions -- evidentiary motions  
25 and other issues on a rolling basis, that may

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1 alleviate the concern that the Board has, and is also  
2 consistent with the parties' own respective  
3 incentives.

4 JUDGE FARRAR: Ms. Clark, how does that  
5 sound?

6 MS. CLARK: I don't see any problem with  
7 that. I think we could file motions, to the extent we  
8 can, as the discovery progresses.

9 JUDGE FARRAR: That would certainly help.  
10 Obviously, there may be some -- you know, some last-  
11 minute things. But if you have, you know, major  
12 problems with the direction the other side seems to be  
13 going, let us know about it right, you know, at the  
14 beginning, because, one, that gives us a moment to --  
15 you know, if you let us know about it as soon as you  
16 know about it, it gives us a moment to think about it,  
17 and lets the opponent -- if your motion is successful,  
18 the opponent reshape the case and prepare an alternate  
19 strategy for the trial.

20 So, in theory, you do them on a rolling  
21 basis, and the most major ones would be first, and  
22 then at the end they would be more minor, where they  
23 may be important but they don't -- they don't destroy  
24 an opponent's case at the last minute, leading to  
25 some, you know, request for a continuance or

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1 something.

2 So let's -- thank you, Mr. McAleer, for  
3 that suggestion; Ms. Clark, for your concurrence. And  
4 let's do that on the evidentiary objections on a  
5 rolling basis starting now. And that would allow, say  
6 -- is a three-day period for replies long enough?

7 MS. CLARK: Your Honor, I think we should  
8 allow for a longer time, simply because I know that we  
9 will be conducting depositions during this time.

10 JUDGE FARRAR: Right. Okay. Let's make  
11 it, then, the -- let's make it five days. Well, in  
12 essence, a week, you know, five business days. So a  
13 week from the time it's filed is when you file a  
14 reply. And then, we will or not have a telephonic  
15 oral argument if we need it. And I think that will  
16 help us.

17 Then, that might -- well, then, we'll  
18 still save that March -- Monday, March 5th date for  
19 oral argument on any last-minute motions and  
20 objections. And, actually, if February 22nd is too  
21 soon, we could use Monday, March 5th to either bring  
22 in the exhibits.

23 As long as we give you the plan for the  
24 exhibits, you could bring them in on Monday,  
25 March 5th, and we could do that administrative work

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1 right there, making sure everybody has copies of  
2 everyone's exhibits. You could set up in your little  
3 rooms we provide you here off the courtroom. And so  
4 let's save that Monday, March 5th date for that.

5 MR. McALEER: All right.

6 JUDGE FARRAR: And perhaps you would  
7 identify your exhibits on Thursday, February 22nd, but  
8 not bring them in until the 5th.

9 All right. That gets us to the --

10 MR. McALEER: Your Honor, just a point of  
11 clarification. I assume the parties, though, will  
12 exchange exhibits on the 22nd. You're talking about,  
13 you know, submitting them to the --

14 JUDGE FARRAR: Right. Good point. I may  
15 or may not have had that in mind, but that makes  
16 sense. You all exchange them on the 22nd, and bring  
17 them in to us on the 5th all stamped, and so forth.

18 Nick, is that all right with you, or would  
19 you want us to try to make sure they got them to us on  
20 the 22nd also?

21 JUDGE TRIKOUROS: Well, they will be  
22 available on the 22nd, obviously, so if we could get  
23 an unofficial copy of them at least, that would be  
24 fine.

25 JUDGE FARRAR: Yes, maybe that would be

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1 good. Just get us, at the time you give one to your  
2 opponent, yes, bring in one -- bring us one copy at  
3 that point, and then we can -- you can bring in all of  
4 the several stamped copies. I think it's three or  
5 four that we require for us and for the Office of the  
6 Secretary of the Commission. So we and your opponent  
7 will get an unofficial copy of the exhibit on the  
8 22nd.

9 All right. You've got starting the  
10 hearing Wednesday, March 7th, going to March 21st,  
11 which is I guess 11 days of hearing. I hate to do any  
12 stereotyping or profiling. But in the PFS case, every  
13 time the lawyers told me how long the hearing would  
14 last, I added 50 percent and I was always right. Do  
15 you think we're really talking about just two weeks?

16 MR. McALEER: Yes, Your Honor.

17 MR. HIBEY: How long do you intend to sit  
18 every day, Your Honor?

19 JUDGE FARRAR: That's a good question. I  
20 have only been on this side of the bench, not the --  
21 never on the other side for trials. And I think it's  
22 easier for us to sit longer than it is for you to be  
23 prepared. What's your norm? Six hours? That would  
24 be a total of six hours of actual hearing time, or do  
25 you want to do more?

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1 MR. HIBEY: I don't think we can do more.

2 JUDGE FARRAR: Yes.

3 MR. HIBEY: Especially if we're going to  
4 have to get ready for the next day.

5 JUDGE FARRAR: Right. So, then, if we did  
6 a 9:00 to 12:15, and a 1:30 to 4:45, allowing a 15-  
7 minute break morning and afternoon, that would work  
8 for you?

9 MR. HIBEY: Yes, it would, Your Honor.

10 JUDGE FARRAR: Okay. Ms. Clark?

11 MS. CLARK: Yes, that sounds very  
12 reasonable.

13 JUDGE FARRAR: Okay. So, basically, 9:00  
14 to 12:15 and 1:45 to whatever.

15 MR. HIBEY: 4:45?

16 JUDGE FARRAR: 5:00.

17 MR. HIBEY: Yes, that's --

18 JUDGE FARRAR: Yes. 9:00 to 12:15 with a  
19 15-minute break included in there, and then 1:45 to  
20 5:00 with a 15-minute break --

21 MR. HIBEY: Yes.

22 JUDGE FARRAR: -- included.

23 All right. We have a tiny bit of bad  
24 news. The dates you picked we have long had scheduled  
25 here our license -- the entire Licensing Board Panel's

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1 annual meeting and seminar.

2 This is where we bring in all of the  
3 judges from all over the country, including we have a  
4 -- not only the full-time legal and technical people  
5 who are housed here, but a number of part-time  
6 technical judges who sit from time to time. They may  
7 be retired, they may have other jobs, and it's a big  
8 production. We bring them in.

9 They're coming in on Tuesday night, or  
10 they're going to be here Tuesday, the 6th, which is  
11 fine. And then, they'll be going the 7th, 8th, 9th,  
12 and 12th. We will do our hearing the 7th, 8th, and  
13 9th. And particularly Judge Hawkens, as the Chief  
14 Judge, has some duties in conjunction with that, but  
15 we will work around those.

16 On Monday, the 12th, we will not be able  
17 to have your hearing that day, because the -- most of  
18 the judges' meeting is offsite somewhere in Bethesda.  
19 But on Monday, the 12th, we need to get them familiar  
20 with the electronic courtroom here, and we will have  
21 an afternoon discussion session that Judge Hawkens in  
22 particular, but all of us need to participate in.

23 So there will be no hearing on Monday,  
24 March 12th. But we are prepared -- we did this in the  
25 PFS case -- to make up for that day or to -- if we

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1 start to fall behind, there is Saturday and Sunday,  
2 the 10th and 11th, and Saturday and Sunday, the 17th  
3 and 18th, if we want to set those.

4 Because we're not going to meet the 12th,  
5 do we want -- and since you had planned 11 days of  
6 hearing, and we've just taken one away from you, do we  
7 want to say now we would meet on Saturday -- we're not  
8 starting until Wednesday that week, that we would meet  
9 on Saturday, March 10th?

10 MR. HIBEY: I think we have to -- why  
11 don't we see where we are?

12 JUDGE FARRAR: All right. But keep that  
13 in mind, because you will only have three days that  
14 week, and only four days the next week, so we will  
15 reserve ourselves Saturday, March 10th, and we can  
16 make a decision on the spot then, or as we approach,  
17 whether we need that date or one or more days the next  
18 weekend.

19 MR. HIBEY: Okay.

20 JUDGE FARRAR: All right. Then, we would  
21 go from the 13th to the 16th, and then -- Tuesday to  
22 Friday, and then Monday to Wednesday, the 19th through  
23 the 21st, and conclude the hearing then. Assume we do  
24 that by extending hours or going on weekends, or  
25 perhaps going a little past Wednesday, we talked at

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1 the very beginning of this conference, Friday,  
2 March 30th is kind of -- is the drop-dead date for  
3 your findings of fact and conclusions of law.

4 So let's commit to meeting that date,  
5 regardless of how we have to push to get the hearing  
6 itself done. So any questions about that?

7 MR. McALEER: No, Your Honor.

8 MS. CLARK: No, Your Honor.

9 JUDGE FARRAR: Okay. Nick, anything about  
10 that scheduling that you wanted to comment on, or  
11 express anything about?

12 JUDGE TRIKOUROS: No, I think it's fine.

13 JUDGE FARRAR: Okay. Anything else that  
14 you all need resolved today or -- if we don't get it  
15 resolved today, you may not get it resolved until  
16 after the 1st. So anything you need resolved before  
17 then?

18 MS. CLARK: Your Honor, for the staff,  
19 actually, looking at the proposed schedule this  
20 morning, there was one area that I thought there might  
21 be some confusion about, so I just wanted to clarify.

22 JUDGE FARRAR: Okay.

23 MS. CLARK: Currently, the schedule shows  
24 on -- as of December 15th that the staff was supposed  
25 to supplement, in accordance with 2.704(c) and (e) and

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1 2.709(a)(4). Those are the regulations that require  
2 the pretrial statements setting forth all witnesses,  
3 witnesses that will be -- all deposition transcripts  
4 that will be used, and that sort of thing.

5 While we did supplement our disclosure, it  
6 was our intention that actually February 22nd would be  
7 the date for both parties to file their written  
8 statements in accordance with 2.704. And I just  
9 noticed that the regulation was actually under the  
10 December 15th date, and I think it really should be  
11 under the February 22nd date.

12 JUDGE FARRAR: So you're talking about  
13 that third item on the proposed case schedule?

14 MS. CLARK: Correct.

15 JUDGE FARRAR: Yes. Mr. McAleer, Mr.  
16 Hibey, does that comport with your understanding of --

17 MR. McALEER: No. I -- Your Honor, this  
18 is Chaz McAleer. No, I -- we -- this schedule had  
19 been discussed and under consideration for quite some  
20 time. This is the first I'm hearing of this.

21 No, the citations to the regulations there  
22 were to capture the obligation of duty of  
23 supplementation. And that's -- our view was that last  
24 Friday was the date on which the staff would do their  
25 supplementation of their discovery responses. As you

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1 know, we had previously indicated areas where we  
2 thought those discovery responses were not complete.

3 Ms. Clark informed me -- in fact, we  
4 specifically talked about this issue, this deadline,  
5 and she told me -- I think it was either last Thursday  
6 or Friday -- that staff did not intend to supplement.  
7 And so this was a topic that we specifically came up,  
8 specifically talked about in context of last Friday's  
9 filing. And at that time, Ms. Clark told me that the  
10 staff chose not to supplement its discovery responses.

11 So I'm not sure exactly why the issue is  
12 coming up now in this context.

13 JUDGE FARRAR: Can you address that, Ms.  
14 Clark?

15 MS. CLARK: Yes. It was always my  
16 intention that the February 22nd date would be the  
17 date for the 2.704 disclosure. And I note that the  
18 things they require are things like designation of  
19 witnesses whose testimony is expected to be presented  
20 by means of a deposition, and, of course, the  
21 identification of these documents and other exhibits.  
22 And that's why the text of the February 22nd date  
23 reflects that.

24 And, obviously -- it seems to me obvious  
25 that these disclosures cannot be made until after we

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1 complete discovery, including deposition discovery.  
2 And it was an oversight on my part. I didn't notice  
3 that the 2.704 regulation was listed under that date.  
4 And when I realized that this morning, I understood  
5 there could have been some confusion about this.

6 MR. McALEER: Your Honor, this is Chaz  
7 McAleer again. I'm still unclear what Ms. Clark is  
8 talking about. We have never talked about any events  
9 occurring on December 22nd, other than what was listed  
10 in the schedule that was attached to the joint motion  
11 that was filed last Friday.

12 MS. CLARK: Well, I'm referring to the  
13 February 22nd date.

14 JUDGE FARRAR: Okay. So, Ms. Clark,  
15 you're saying whatever McAleer thought you were doing  
16 on December 15th, you --

17 MS. CLARK: I was -- he asked me whether  
18 I was supplementing as of that date. And as of now,  
19 we have no additional information to disclose in  
20 response to interrogatories. What I did is I  
21 supplemented our document disclosures, because I did  
22 have additional documents to disclose. As of this  
23 time, our interrogatory responses are complete.

24 I'm not -- that's not to say that we may  
25 not come across additional information and be required

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1 to supplement in the future. But our 2.704  
2 disclosures, which are the pretrial disclosures, which  
3 include identification of documents and witnesses, and  
4 any deposition testimony that we may use, is to be --  
5 I understood always to be in the February 22nd date.  
6 And that's why the text in that block basically mimics  
7 the regulatory requirement in 2.704.

8 JUDGE FARRAR: Mr. McAleer, has Mr. Geisen  
9 provided the 2.704(c) pretrial disclosures yet?

10 MR. McALEER: Your Honor, we provided the  
11 initial disclosures back in July. The issue here --  
12 2.709 is the procedure that --

13 JUDGE FARRAR: 2.709, I'm sorry.

14 MR. McALEER: 2.709 -- and, again, let me  
15 just say, I will readily defer to others more steeped  
16 in NRC than I. But my reading of it was 2.709 is the  
17 provision that calls for -- that permits -- under  
18 which one obtains discovery from staff. 2.709(a)(4)  
19 imposes upon the staff a duty of supplementation.  
20 2.709(a)(4) incorporates, by reference, the  
21 obligations under 2.704(c) and (e).

22 JUDGE FARRAR: Okay.

23 MR. McALEER: However one gets there, we  
24 have indicated in detail to Ms. Clark the numerous  
25 ways in which information that had been requested in

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1 our discovery requests were not provided in staff's  
2 discovery responses. We detailed those.

3 I have not heard a dispute as to our  
4 characterization of what was included and not included  
5 in those discovery responses. And whether staff  
6 provided it on December 15th, or should have provided  
7 it before that, we had indicated where there were  
8 significant gaps.

9 And it was our position -- and certainly  
10 as I raised it with Ms. Clark before December 15th --  
11 that we believe that they had a duty to supplement on  
12 December 15th. And she indicated, without citing any  
13 misunderstanding or dispute, that they did not intend  
14 to do so.

15 JUDGE FARRAR: But the --

16 MS. CLARK: Your Honor, if I may respond.  
17 I really don't -- I hate to get into a --

18 JUDGE FARRAR: Wait, wait. Before you  
19 respond, Mr. McAleer, you're saying -- and I know this  
20 2.709 applies to discovery against the staff, and I'll  
21 get your comment on that in a moment. But the 2.704  
22 that it incorporates there, you're saying you've  
23 already done that. Have you done that thoroughly, or  
24 was your July filing just kind of an initial cut at  
25 it, and you could correctly do more now?

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1 MR. McALEER: Well, Your Honor, it was  
2 thorough at the time, thorough certainly in the  
3 identification of persons who may have knowledge,  
4 certainly thorough in terms of the identification of  
5 documents that may relate to the claims. And as of  
6 our filings on December 15th, we have provided  
7 additional information in detail.

8 JUDGE FARRAR: Go ahead, then, Ms. Clark.

9 MS. CLARK: What I believe was provided  
10 was a listing of individuals who may have knowledge  
11 relevant to these matters. We have not received any  
12 statement of witnesses, as required by that  
13 regulation, which specifically provides that we have  
14 to provide each witness -- the name of each witness  
15 whom the party expects to present, those whom the  
16 party may call as the need arises.

17 It also requires the designation of those  
18 witnesses whose testimony is expected to be presented  
19 by means of a deposition, and, when available, a  
20 transcript of the pertinent portions of the  
21 deposition, and an appropriate identification of each  
22 document or other exhibit.

23 Certainly, Mr. McAleer has not provided  
24 that information. And just by the reading of it, it's  
25 apparent that that information cannot be presented

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1 until deposition discovery is completed.

2 JUDGE FARRAR: Let me see, given what  
3 you've both said, if I can come up with a sensible  
4 answer on my own. And since some of it will be  
5 heretical, I will not ask Judge Hawken, who is in a  
6 position of authority here, to agree, or for the Panel  
7 to agree with me and Judge Trikouros, who only signed  
8 on a year ago.

9 If you look at these regulations, in an  
10 ordinary licensing action, the staff is treated as a  
11 special party, because what's at issue in most of our  
12 hearings is an intervenor doesn't like what the  
13 applicant is doing.

14 And while the staff participates in the  
15 hearing, and what they've done is important, and  
16 passing on the proposed license is important, what's  
17 -- the precedents here say what's an issue is, does  
18 the applicant have a sound proposal? And so the staff  
19 is kind of a third -- a very interested third party on  
20 that.

21 So a lot of the regulations I have found  
22 have been written with that in mind, that the staff  
23 has a special role, different from the intervenor,  
24 different from the applicant, in that kind of  
25 proceeding. It seems to me -- and I don't know that

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1 I could find this in the regulation anywhere -- that  
2 as far as an enforcement case is concerned, the staff  
3 and the person to whom the enforcement order was  
4 issued are parties of equal standing.

5 So it would seem that in fairness, in  
6 trying to interpret regulations that were written with  
7 major licensing proceedings foremost in mind, that  
8 this would be an area where both parties ought to be  
9 treated differently. If you accept that, as I say,  
10 somewhat heretical notion, would it make sense for us  
11 to pick a new date where both sides would file what's  
12 called for by 2.704, which is incorporated in the  
13 2.709? Does that make any sense to anybody?

14 MS. CLARK: Yes, Your Honor. And, in  
15 fact, that's what the staff had contemplated.

16 JUDGE FARRAR: Okay.

17 MS. CLARK: The 22nd, because that would  
18 be after the close of depositions.

19 JUDGE FARRAR: Mr. McAleer?

20 MR. McALEER: Well, what I had raised  
21 previously with Ms. Clark, and what had been the  
22 subject of our discussions, was related to disclosures  
23 and information that would inform the deposition and  
24 discovery process.

25 So for staff to have withheld information

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1 that we delineated in our extensive analysis to their  
2 discovery response, and to be now suggesting that that  
3 sort of information need not be presented or disclosed  
4 until after the close of discovery, I don't find to be  
5 really consistent with the spirit of the rules.

6 JUDGE FARRAR: Well, then, if I accept  
7 that, we could say to the staff, why don't you file,  
8 by some time in the first third of January, the  
9 equivalent of what Mr. Geisen filed last July, or --  
10 that would put you on an equal footing, or we could  
11 say both sides could ramp-up from that and file  
12 something by the first half of January, file something  
13 that's -- something more than Mr. Geisen filed last  
14 July. Would that -- either of those would put you on  
15 an equal footing. Is that a sensible idea? And, if  
16 not, somebody come up with a better one.

17 MR. McALEER: Well, actually, Your Honor,  
18 if I may suggest, as my comments have indicated, I  
19 find this issue to be coming a little bit out of left  
20 field, and I'm, frankly, not prepared to really  
21 address it as well as I would like right now.

22 My suggestion would be that Ms. Clark and  
23 I discuss this, see if, as with other issues, the  
24 parties are able to reach an agreement, and then come  
25 back with a proposal to the Board.

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1 JUDGE FARRAR: Okay. And then, I would  
2 say the operating principle you could take from the  
3 Board -- and I think here I can speak for Judge  
4 Hawkens and Judge Trikouros, is what we want is you  
5 both to be on an equal footing with respect to this.

6 You know, take what the regulation says,  
7 take what you filed last July, and come up with  
8 something where you're both exchanging with each other  
9 at the same time whatever you decide that regulation  
10 is driving at, not necessarily exactly what it says,  
11 but in the context of the schedule we've adopted here  
12 today, and all of the other filings, what should you  
13 all be exchanging with each other before depositions  
14 start that would comply with the essence of what that  
15 regulation is driving at and achieve fairness between  
16 you. Is that -- would that help guide your  
17 discussions, Mr. McAleer?

18 MR. McALEER: It does indeed, Your Honor.  
19 Thank you.

20 JUDGE FARRAR: Ms. Clark?

21 MS. CLARK: Yes, Your Honor.

22 JUDGE FARRAR: Okay, fine. Well, Ms.  
23 Clark, I'm glad you brought that up, because we  
24 wouldn't have wanted that lurking out there, because  
25 I think with that clarified we've made great progress

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1 today, mostly because you all made great progress  
2 after our last conference call in terms of really  
3 turning to this and ironing out some serious problems,  
4 and, as I said at the very beginning, coming up with  
5 a very aggressive -- very aggressive schedule.

6 And so I think this gives us a real plan  
7 for getting to a March -- that Wednesday, March 7th  
8 start of a hearing here in our Rockville courtroom.  
9 And let's meet all those filing dates. Call on us  
10 whenever you need us for an impromptu or otherwise  
11 phone conference.

12 And if we don't see you before then, we  
13 would look forward to seeing you on Monday, March 5th,  
14 to do the -- all of the formal administrative work, so  
15 that when we start up at 9:00 on the 7th, we can  
16 launch right into the hearing.

17 Anything else we need?

18 MR. McALEER: Yes. This is Chaz McAleer  
19 again. And thank you, Your Honor, for those comments  
20 and for the Board's time.

21 One thing just for point of clarification  
22 and to frame the parties' discussions on this issue we  
23 were just discussing, the provision that was cited in  
24 the proposed schedule, 2.709(a)(4) --

25 JUDGE FARRAR: Yes.

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1 MR. McALEER: -- which relates to  
2 discovery against the staff --

3 JUDGE FARRAR: Right.

4 MR. McALEER: -- says, "The provisions of  
5 2.704(c) and (e)," which are those supplementation  
6 provisions we've been talked about, "apply to  
7 interrogatories served under this paragraph." It is  
8 not, as Ms. Clark had indicated, related to the issue  
9 of disclosures. It's an interrogatory issue.

10 And it was in that context that these  
11 provisions have been included in the schedule, and it  
12 certainly was in -- it was in that sense that I  
13 understood and was discussing the issue with Ms.  
14 Clark. And so I'm happy to have the discussion that  
15 we've indicated that the parties will have on this  
16 topic, but I just did want to clarify that for the  
17 record.

18 JUDGE FARRAR: Okay. Thank you for that.  
19 With that clarification, I think what I was exhorting  
20 you to, and what I think you agreed to, was to have a  
21 discussion broader than that?

22 MR. McALEER: Yes.

23 JUDGE FARRAR: Yes. Okay.

24 Ms. Clark, was that your understanding?

25 MS. CLARK: Yes, Your Honor.

1 JUDGE FARRAR: Okay, good. Well, let's  
2 add that, then, to the items to be done. As I said,  
3 call on us whenever you need us. Don't hesitate.

4 We will, probably after the 1st,  
5 incorporate all this in an order, you know, with a  
6 formal schedule. But you all will get the transcript  
7 of this. And I assume you've all been taking the same  
8 notes we have, so I think we're all in agreement on  
9 how to proceed. And thank you all for getting us to  
10 this point.

11 Anything else for the good of the order?

12 MR. McALEER: No, thanks. Thank you to  
13 the Board and to the staff.

14 JUDGE FARRAR: Ms. Clark?

15 MS. CLARK: Thank you, Your Honor.

16 JUDGE FARRAR: All right. Thank you, all.

17 (Whereupon, at 11:25 a.m., the  
18 proceedings in the foregoing matter were  
19 concluded.)  
20  
21  
22  
23  
24  
25



CERTIFICATE

This is to certify that the attached proceedings  
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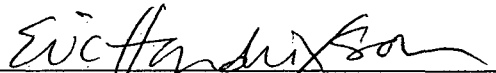
Name of Proceeding: Hearing ITMO

David Geisen

Docket Number: IA-05-052

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