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June 24, 2008

Hon. Michael C. Farrar, Chairman
Hon. E. Roy Hawkens
Hon. Nicholas G. Trikouros
Atomic Safety and Licensing Board
United States Nuclear Regulatory Commission
Mail Stop: T-3 FD23
Washington, DC 20555

Re: In the Matter of David Geisen, Docket No. IA-05-052

Your Honors:

During the stay of the above-captioned case, Mr. Geisen's criminal case resulted in his conviction and is being appealed. Execution of judgment has not been stayed pending appeal. He is serving his sentence of probation, one condition of which is his debarment from employment in the nuclear industry for the 3-year period of said probation. The court stated if Mr. Geisen were "reinstated" by the NRC and had the opportunity for reemployment, it would reconsider his request that that condition be rescinded.

This letter is to request a hearing before this Board to schedule proceedings addressing the question of whether Mr. Geisen's 2006 debarment by the NRC should be terminated *instanter*.

We are attaching herewith the following documents from the criminal case:

Exhibit A - The Government's Sentencing Memorandum.

Exhibit B - Defendant's Memorandum in Aid of Sentencing.

Exhibit C - Transcript of Sentencing.

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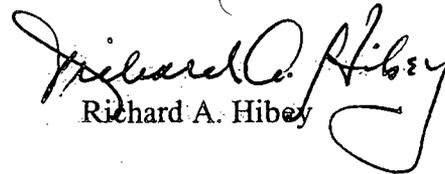
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At a minimum, the materials are an indispensable part of the record we will ask the Board take into account in deciding the issue we have presented. Of course, we will be prepared to answer questions the Board has about the criminal case and its relationship to the instant matter.

Sincerely,


Richard A. Hibey

Enclosures

cc: Lisa B. Clark
Margaret Parish
Libby Perch

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,)	Case No. 3:06CR712
)	
Plaintiff,)	JUDGE KATZ
)	
v.)	GOVERNMENT'S SENTENCING
)	MEMORANDUM
DAVID GEISEN, et al.)	
)	
Defendants.)	

THE UNITED STATES, through undersigned counsel, submits the following comments regarding the sentencing of Defendant David Geisen.

1. Defendant's Conduct Warrants An Upward Departure Above the Guideline Range Set Forth In The Presentence Investigation Report

As noted in the PSI at paragraph 118, the United States believes that an upward departure from the guideline range specified in the Presentence Investigation Report ("PSI") is justified in this case.

In deciding whether to apply an upward departure, Sixth Circuit precedent requires a multi-step analysis. First, a sentencing court must consider what feature(s) of the case, potentially, take it outside the Guideline's "heartland," making the case special or unusual. U.S. v. Pluta, 144 F.3d 968, 978 (6th Cir. 1998). Here, the feature the Government contends is unusual is the threat to public safety posed by Mr. Geisen's efforts to deceive the NRC in an arena where a loss of coolant accident was a serious risk. Next, the court must determine

whether the distinguishing feature is one upon which the Sentencing Commission forbids, allows, encourages, or discourages departures. Id. In this case, the Commission encourages upward departures to reflect the nature and seriousness of the threat. U.S.S.G. §5K2.14; Pluta, 144 F.3d at 979 (noting that the Guidelines encourage an upward departure where public safety is endangered and ruling that dry-firing a pistol in traffic endangered public safety).

Where the Guidelines encourage a departure, a sentencing court may use it to increase a sentence so long as the otherwise applicable guidelines do not take it into account. Pluta at 978. Here, the applicable guideline, U.S.S.G. § 2B1.1(a)(c) does not account for situations where deception of a government regulator prevents the timely revelation of a problem posing fundamental public safety risks. Thus, this court may apply the guided departure at § 5K2.14 to account for the unusual situation it faces. As correctly noted in the PSI, the development of the corrosion hole at Davis Besse has been ranked as one of the most serious safety related incidents in the history of nuclear power in the United States. Defendant Geisen's false statements hid an emerging safety problem from the NRC at a time when the corrosion hole was developing rapidly, according the testimony of Dr. Bullen, Defendant Geisen's own expert.

The United States submits that the seriousness of Defendant Geisen's actions should be reflected by an upward departure to an offense level of 12, and that Defendant should be sentenced to a year of incarceration followed by a three year term of probation. A sentence that does not include a period of incarceration would not afford adequate deterrence to the criminal conduct at issue here. See 18 U.S.C. § 3553(a)(2)(B).

2. Defendant's Sentence Should Include A Term Of Probation With A Prohibition On Involvement In Activities Licensed By The Nuclear Regulatory Commission

The PSI correctly observes that under the Sentencing Guidelines, the Court can impose a term of probation or supervised release. The United States submits that the Court should impose a term of probation of not less than three years, and that it should include an occupational restriction prohibiting Defendant from involvement in NRC licensed activity.

Section 5F1.5 of the Sentencing Guidelines permits such an occupational restriction to protect the public. It states that the court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation if (and only if) it determines that:

- (1) a reasonably direct relationship existed between the defendant's occupation. . . . and the conduct relevant to the offense of conviction; and
- (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

The Guideline further states that the court shall impose the condition for the minimum time and minimum extent necessary to protect the public.

Here, the application of this guideline is clearly warranted. Defendant Geisen participated in preparing the responses to NRC Bulletin 2001-01 as a part of his regular duties at the Davis Besse Nuclear Power Station. It was directly related to his employment there. Further, the United States submits that such a ban is necessary to protect the public. Defendant Geisen denies that he knowingly provided false information or intended to deceive the NRC. However,

a jury has found otherwise. Moreover, at trial defendant Geisen conceded the “failures of FENOC” and the “falsity of statements” made on its behalf. Memorandum of Points And Authorities In Support of Defendant Geisen’s Motion For Acquittal at 32. Based on his own admission that he reviewed videotapes, and his statements to Jack Martin about reviewing the tapes, it is clear that he reviewed the video records before he made statements he now acknowledges were false, including multiple oral representations to NRC staff that the reactor vessel head had been “verified” to be popcorn-free. Moreover, at trial he also admitted making this “strong representation” at a time when he knew that Andrew Siemaszko, had not yet completed his nozzle-by-nozzle review. Tr. at 91-92. Defendant Geisen’s statement that the vessel head had been “verified” popcorn-free was therefore false, and he knew it, by his own admission.

Given this record the United State submits that imposition of an employment restriction is necessary to protect the public. Because Defendant Geisen has falsely denied that he knew that statements made by him and others were false, this Court can have no confidence that Defendant Geisen will not put the public at risk in the future working in an industry whose safety depends on the integrity of its workers. The United States submits that limiting the ban to the nuclear industry and to a three year term is the minimum extent necessary to protect the public.

3. The Presentence Report Otherwise Fairly Presents The Factors Relevant to Sentencing

The United States believes that the PSI otherwise fairly presents the factors relevant to sentencing in this case and notes that Defendant’s Objection No. 1, as set forth in the PSI at 23, is

immaterial to the application of the Sentencing Guidelines by the Court.^{1/}

Conclusion

For the reasons set forth above, the United States submits that the appropriate offense level to apply in this case is level 12, and that Defendant Geisen should be sentenced to one year of incarceration followed by a three year term of probation, with the employment restriction set forth above.

Respectfully submitted,
William J. Edwards
Acting United States Attorney

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^{1/} Defendant's Objection No. 1 asserted that "5 engineers reported" to him, rather than the 12 engineers indicated by the United States. In fact, according to Defendant Geisen's own testimony at trial, he had 5 engineers directly reporting to him, and 30-32 indirect reports. Tr. at 1687.

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CERTIFICATE OF SERVICE

I certify that on April 28, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

s/ Richard Poole
Richard Poole
Senior Trial Attorney
Environmental Crimes Section
United States Department of Justice

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
)
)
v.)
)
DAVID GEISEN)
)
Defendant)

No. 3:06CR712 (Katz)

DEFENDANT'S MEMORANDUM IN AID OF SENTENCING

I. INTRODUCTION

David C. Geisen, through undersigned counsel, submits the following memorandum in aid of sentencing. Mr. Geisen stands before the Court following conviction on the three counts of violation of 18 U.S.C. § 1001 (false statements) arising out of events that occurred at Davis-Besse Nuclear Power Station (Davis-Besse) in the fall of 2001. He is a forty-seven year old, father of three children who served for six years in the United States Navy. He has never been convicted of a crime. While he maintains his innocence of the criminal charges brought against him, he has fully accepted responsibility for his part in the professional failures that led to the events at Davis-Besse close to seven years ago. His professional career is over by virtue of his conviction in this case and he has suffered enormous financial detriment. The evidence against him did not include any suggestion that he derived a personal benefit from the acts alleged, nor did it credibly establish his motive or intent to engage in criminal activity. For all of these reasons, we urge to Court to impose a probationary sentence.

This memorandum will first address objections we have with the content of the Pre-Sentence Investigation Report (Report). In sum, we believe that the Probation Officer reached

an incorrect Adjusted Offense Level by including two sentencing enhancements that lack evidentiary foundation.

Next, we set forth reasons that, regardless of the Court's final determination of the offense level, the factors in this case, including Mr. Geisen's personal history, support a sentence of probation.

II. OBJECTIONS TO THE PRE-SENTENCE INVESTIGATION REPORT

A. The Proper Adjusted Offense Level Should be 6, Not 10.

The adjusted offense level of 10 reflected at paragraph 71 of the Report improperly includes two upward adjustments unsupported by the factual record developed by the government. We therefore object and submit the proper adjusted offense level is six, reflecting the base offense level for the offense of False Statements in violation of 18 U.S.C. § 1001 found at § 2B1.1(a)(6) of the Guidelines.

1. An Upward Adjustment Pursuant to U.S.S.G. § 3B1.1(c) is Unjustified.

The Report assigns a two point upward adjustment pursuant to U.S.S.G. § 3B1.1(c) on the grounds that Mr. Geisen was "an organizer, leader, manager or supervisor of less than five participants in this offense." Report, ¶ 68. That conclusion is not supported by the facts of the case and the adjustment is therefore unwarranted.

Mr. Geisen did hold the title of "manager" at First Energy Nuclear Operating Company. However, the application notes to the relevant subsection of the Guidelines cautions that titles are not controlling. U.S.S.G. § 3B1.1 note 4. Instead, the Court is instructed to consider factors including:

the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature or scope of the illegal activity, and the degree of control or authority exercised over others.

Id.

Moreover, the Sixth Circuit has made clear that “[m]erely playing an essential role in the offense is not equivalent to exercising managerial control over other participants and/or the assets of a criminal enterprise.” *United States v. Vandenberg*, 201 F.3d 805, 811-812 (6th Cir. 2000) citing *United States v. Albers*, 93 F.3d 1469 (10th Cir. 1996).

In the addendum to the presentence report, Probation Officer Butler responded to our initial objection on this issue by suggesting that the adjustment was warranted because Mr. Geisen’s position as a manager put him in a position to make statements in person and in writing to the NRC, thus demonstrating the requisite level of decision-making authority. We respectfully disagree with Mr. Butler’s conclusion and submit that the evidence elicited at trial simply contradicts that conclusion. FENOC’s Regulatory Affairs department assigned tasks to a number of engineers in the process of crafting and submitting the Bulletin responses. Numerous individuals participated in telephone conference calls and in-person meetings with the NRC between September 28, 2001 and November 28, 2001. Participation was not limited to managers at Mr. Geisen’s level and above, but was determined instead by individuals’ involvement in relevant tasks. For example, the evidence showed that Mr. Siemaszko, a systems engineer, went to NRC headquarters in November 2001 to speak about his past inspection and cleaning efforts and to discuss his review of videotapes. Ken Byrd, another line engineer, participated in discussions with the NRC about the crack growth rate model. The conclusion that Mr. Geisen’s *position* afforded him the opportunity to present information to the NRC is simply unsupported. An enhancement based on Mr. Geisen’s title would be inconsistent with the purpose and intent of the Guidelines.

Moreover, the record is devoid of any evidence that Mr. Geisen exercised managerial control over others participants in a criminal enterprise. *See United States v. Hopson*, 134 Fed.

Appx. 781, 2004 U.S. App. LEXIS 10189 (6th Cir. 2004) (unpublished opinion). He was assigned to oversee and support the work of Mr. Siemaszko and Mr. Byrd. But there was no evidence or testimony that suggests Mr. Geisen controlled or influenced the work either man produced, influenced their opinions, or suggested they act in furtherance of any illegal aims. Indeed, despite indicting Messers. Geisen, Siemaszko, and Cook on the theory that they participated in a "scheme", the government repeatedly argued at trial and again in post-trial litigation that the scheme allegation in this case did not require the government to prove coordinated action between individuals. We continue to maintain the government's proof varied from the theory articulated in the indictment, but for purposes of the § 3B1.1 analysis, that issue is of no moment. The government would have to concede that it introduced no evidence of coordinated action between Mr. Geisen and Mr. Siemaszko, nor did it introduce any evidence that Mr. Geisen "controlled" the actions of others in furtherance of criminal ends. Mr. Geisen's liability, pursuant to the government's theory, was for statements and representations he made, not for statements and representations he induced others to make.

The factors relating to "management" set forth in the Guidelines comments demonstrate the type of managerial activity intended to support an adjustment: the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, ...and the degree of control or authority exercised over others. U.S.S.G. 3B1.1 note 4. Similarly, Courts have discussed activities justifying an enhancement. In *United States v. Graham*, the U.S. Court of Appeals for the District of Columbia Circuit overturned a District Court's application of an upward adjustment because:

The record is devoid of any evidence that [appellant] received extra compensation for serving as a manager, disciplined any lower ranking member of the

conspiracy, altered the conspiracy's policies or procedures in any respect, provided guidance to senior managers or subordinates, issued any orders on behalf of the conspiracy, or otherwise held himself out as a link in the chain of command.

162 F.3d 1180, 1184 (D.C. Cir. 1998). The Sixth Circuit has noted the existence of evidence of similar factors in upholding application of enhancements. *United States v. Trujillo*, 376 F.3d 593 (6th Cir. 2004) (citing appellant's recruitment of other individuals and detailed instruction to those same individuals regarding the execution of clearly criminal enterprise). Given the lack of any evidence that Mr. Geisen engaged in similar managerial conduct in the commission of the offenses for which he was convicted, an upward enhancement pursuant to U.S.S.G. § 3B1.1 would be improper.

2. An Upward Adjustment Pursuant to U.S.S.G. § 3B1.3 is Unjustified.

The Report assigns a two point upward adjustment pursuant to U.S.S.G. § 3B1.3 on the grounds that Mr. Geisen "abused a position of trust in committing this offense based on his knowledge and position." Report ¶ 69. In the addendum to the Presentence Report, Mr. Butler states that Mr. Geisen used his position as engineering manager to make false statements to the NRC and was "entrusted by FENOC and the NRC to be truthful when representing serious potential public safety issues involving his area of knowledge and authority." For the reasons set forth in the previous section, the evidence does not support the conclusion that Mr. Geisen "used his position" to make false statements to the NRC. The government's indictment of a line engineer (Andrew Siemaszko) and a consultant (Rodney Cook) along with Mr. Geisen contradicts any suggestion that the NRC relied upon statements of various FENOC employees because of their positions. Even if the evidence were otherwise, Mr. Geisen's position as a manager cannot support enhancements under two separate provisions.

The government argued throughout the trial that the NRC expected licensees to provide truthful responses to the Bulletin and relied upon information from FENOC in making its decisions. Those factors, however, go to the materiality of the statements, which is an element of a false statements offense under 18 U.S.C. § 1001. To the extent that the making of a material false statement is an act punishable under the Guidelines, the base offense level of six for a violation of 18 U.S.C. § 1001 contemplates the harm caused to the government caused by the making of material false statements. An upward adjustment must therefore be based upon a fact-specific circumstance that makes a particular act worthy of additional punishment.

The rationale for an enhancement pursuant to § 3B1.3 is “virtually analogous to the type of punishment routinely administered for violating a fiduciary duty.” *United States v. Gilliam*, 315 F.3d 614, 618 (6th Cir. 2003) citing *United States v. Ragland*, 72 F.3d 500 (6th Cir. 1996). Accordingly, the “position of trust” applies “when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position, ceding to the other’s presumed better judgment some control over their affairs.” *United States v. Brogan*, 238 F.3d 780, 783 (6th Cir. 2001).

Again, the application notes to the Guidelines provide definition and include examples of the types of relationships that warrant enhanced punishment. Specifically, the notes state,

“[f]or this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant’s responsibility for the offense more difficult.) This adjustment, for example, applies in the case of an embezzlement of a client’s funds by an attorney serving as a guardian, a bank executive’s fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.

U.S.S.G. § 3B1.3, note 1.

The government did not elicit any evidence suggesting that Mr. Geisen held a fiduciary role vis-à-vis the NRC or that the NRC was a vulnerable to control by its licensees. The NRC’s

maintenance of Resident Inspectors at licensees' plants and its ability to compel information and access to licensees' operations undercuts any such suggestion.

The government will certainly argue that the NRC relies upon its licensees for truthful information in order to perform its function. But that is the case with every licensee-licensor relationship and it also true in other relationships involving government investigative agencies. 18 U.S.C. § 1001 recognizes the importance of the government receiving truthful information from those questions by government officials by criminalizing the making of false statements. Nothing in the relationship between the NRC and FENOC, and by extension the NRC and Mr. Geisen creates the type of fiduciary-like position of trust necessary for an enhancement pursuant to § 3B1.3.

3. An Upward Departure Pursuant to § 5K2.14 is Unwarranted.

The government identified § 5K2.14 as a possible grounds for an upward departure above the guideline range in this case. Report ¶118. The Probation Officer disagreed, and we concur with his judgment. Notwithstanding the government's repeated allusions to Three Mile Island statements throughout this case, now repeated in the Report, the events at Davis-Besse did not pose a threat to public safety. That position was articulated by the then-Chairman of the NRC, Nils J. Diaz, in an October 5, 2004 letter to the Cleveland Plain-Dealer. In his letter, attached to this Memorandum as Exhibit 1 and available on the NRC's website at <http://www.nrc.gov/reading-rm/doc-collections/for-the-record/2004/njd-letter-to-editor.pdf>, Chairman Diaz wrote:

... A hole in the head of the reactor was an enormous failure on the part of the licensee and of the NRC. I want to say that loud and clear...I want to say equally loudly and clearly that it was not close to being the impending disaster publicly portrayed. It may be asked, aren't those two statements inconsistent? They are not. In this case, our preliminary analysis indicates that the stainless steel liner of the vessel head, thin as it was, was more than adequate to contain the pressure generated within, and it would have done so for quite a while.

Today, we know that the liner was adequate to contain pressure for a period after the discovery of the problem. My 2003 comments also addressed the potential failure of the liner and are needed to give the public the complete picture. I went on to say: The reactor cooling systems, the emergency core cooling systems, and the containment systems, combined with the operator's actions, procedures, and emergency plans, constitute a multi-faceted defense to protect the public."

... I am convinced that if the liner had been breached, the layers of safety would have protected the people of Ohio, and that is the bottom line...."

Mr. Geisen has repeatedly conceded Chairman Diaz's initial premise: the hole was an enormous failure on the part of Davis-Besse and of the NRC. Had the hole developed to the point where the liner ruptured, the containment unit the Court heard so much about throughout the trial would have been exposed to reactor coolant and FENOC would have suffered enormous financial loss. But there is simply no evidence that the public health or safety was "significantly endangered" warranting an upward departure under § 5K2.14. The fact that the NRC's Chairman has strongly repudiated the suggestion that the community was at risk should end this debate decisively.

B. Conclusion

For the reasons set forth above, we submit that the proper Adjusted Offense Level is six, not 10 as reported in the Presentence Investigation Report. That offense level would yield a Guideline range of imprisonment of zero to six months (as opposed to six to 12 months for offense level 10) and a guideline fine range of \$500 to \$5,000 (as opposed to \$2,000 to \$20,000 for offense level 10).

III. THE COURT SHOULD SENTENCE MR. GEISEN TO A SHORT PERIOD OF PROBATION.

For the reasons set forth above, the properly calculated offense level yields lower guideline ranges for potential incarceration and potential fine than those provided in the Report. However, even under the analysis of the Report, Mr. Geisen is eligible for a sentence of

probation. Report ¶108. We submit that various aspects of this case, including the conduct at issue, the minimal evidence of knowledge, intent, and motive, and Mr. Geisen's exemplary personal history prior to the conviction compel the conclusion that a short period of probation is the appropriate and just sentence.

Last year, in *Gall v. United States*, ___ U.S. ___, 128 S. Ct. 586 (2007), the Supreme Court articulated two principles important to this Court's fashioning of a just sentence. First, the Court recognized that while "custodial sentences are qualitatively more severe than probationary sentences of equivalent terms...[o]ffenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty." *Id.* at 595. Second, the Court expressly reaffirmed the ability and obligation of a sentencing judge to weigh individual, case- and defendant-specific factors in fashioning a just and appropriate sentence, even if that sentence falls outside of the range established by the advisory sentencing guidelines. *Id.* at 594-602.

The Court is certainly familiar with the various factors set forth in 18 U.S.C. § 3553(a) to be considered in imposing a sentence. In our view, consideration of a number of those factors demonstrates that incarceration is unwarranted and that a sentence of probation with a minimal fine would comply with the purposes set forth in 18 U.S.C. § 3553(a)(2).

A. Nature and Circumstances of the Offense

While it is not our intent to relitigate issues of guilt or innocence in this memorandum, it is relevant to sentencing that the government's evidence of Mr. Geisen's individual guilt was far from overwhelming. In considering this factor, it is important for the Court to segregate the government's theory of the entire offense from the evidence of Mr. Geisen's role in that offense. The government repeatedly referred to FENOC, the corporate entity, throughout the trial. But in fashioning Mr. Geisen's sentence, the Court must consider his role, his knowledge, his intent, and his culpability, notwithstanding statements about the actions of FENOC as a company or

evidence of corporate culture unconnected to Mr. Geisen. In short, the Court is not sentencing this individual for the alleged sins of his employer.

On issues specific to Mr. Geisen, which directly impact the Court's consideration of the nature of circumstances of *his* offense, we submit that the evidence was weak. The jury grappled with it over four days of deliberation and their comments afterwards indicated deep divisions and hesitancy. The Court itself noted the closeness of the case on several occasions. In evaluating the nature and circumstances of the offense, a primary consideration is the severity of the conduct subject to punishment. It is therefore noteworthy that there was no unambiguous evidence of Mr. Geisen's intent or motive to commit the offenses for which he was convicted, nor was there any evidence of his personal gain as a result of his conduct. The government, despite a lengthy NRC investigation followed by an equally lengthy grand jury investigation, did not uncover a single witness who said Mr. Geisen expressed any recognition that his conduct was criminal or even that his statements to the NRC were false. This is not a case in which the Court must consider evidence that a defendant attempted to cover up his acts or to obstruct discovery of the truth. The government has repeatedly argued that in these types of cases, a defendant's knowledge and intent is not often given to direct proof. We disagree. Certainly, the Court has presided over plenty of cases where a defendant made statements evincing knowledge that an action taken was wrong or illegal. Many cases turn on emails encouraging document shredding or deceitful statements to investigators consistent with guilty knowledge. No such evidence existed in this case.

While not admissible for the purpose of impeaching the verdict or considering Mr. Geisen's post-trial motions, the impressions of the community members who adjudicated the facts in the case should be of interest. It is noteworthy that many jurors expressed the view that

they judged Mr. Geisen differently from Mr. Cook because Mr. Geisen was a manager with a history of good work who therefore had an obligation to live up to a higher standard. The jurors uniformly found Mr. Geisen to be sympathetic and many said they found him to be reliable. When asked how that impression could be squared with the jury's convictions on three counts, many responded that they felt Mr. Geisen had an obligation to do a better job. They felt that under their understanding of the willful blindness instruction, Mr. Geisen's failure to discharge his obligation to figure out that FENOC statements in late October and early November were "at least misleading" sufficed to support their verdicts.

It was also clear that many of the jurors were upset by the verdicts they returned. Many expressed the view that Mr. Geisen was "scapegoated" and wondered why others at FENOC and at the NRC had not been prosecuted. Many used the word "unfair" to describe their feelings about having to sit in judgment of Mr. Geisen while others they viewed with suspicion, or worse, were called to testify against him. One juror wept throughout much of our hour-long meeting with counsel. It is perhaps a testament to the jury's commitment to their understanding of the instructions that they reached their verdict in spite of what they considered to be the inequity of the situation. We fully understand that it is the Court's role, and not the jury's, to determine punishment. But to the extent the Court considers the culpability of the defendant as one of the many factors in fashioning a just sentence, the views of those who were selected from the community to hear and evaluate the testimony should carry some weight.

B. The History and Characteristics of Mr. Geisen

Mr. Geisen's history and character, both in connection with this case, and in his life outside of this case, also militate in favor of a probationary sentence. Defendants are often granted a reduction in their potential sentence for acceptance of responsibility. Obviously, in a case where an accused has denied the accusation of criminal conduct and been convicted at trial,

the two-point reduction under U.S.S.G. § 3E1.1 is inapplicable. However, the principle behind that reduction does have some application in this case, given Mr. Geisen's consistent acceptance of responsibility for mistakes he made in the performance of his job.

FENOC discovered the cavity in the Davis-Besse reactor vessel head on March 6, 2002. FENOC and the NRC immediately commenced investigations, including Root Cause analyses and Augmented Inspection Team inspections. Mr. Geisen was interviewed four times between March and June 2002 in connection with those investigations. The NRC Office of Investigations (OI) initiated an investigation, and Mr. Geisen was interviewed for four-and-a-half hours on October 29, 2002. Throughout each of those sessions, Mr. Geisen was candid about his failures, and those of the entire management team. He acknowledged mistakes, and conceded that he and others focused on a particular issue that led them to miss the more significant concern. He did not blame FENOC's failures on others, nor did he attempt to deflect blame for his own mistakes.

At the time that Mr. Geisen made those statements, there was no indication that he was suspected of criminal activity. As Mr. Ulie conceded, Mr. Geisen was not advised at the start of the interview that OI was conducting a criminal investigation. Mr. Geisen was genuinely self-critical in an effort to evaluate how mistakes had been made and how the cavity in the reactor vessel head had grown, undetected, to the extent it had reached. The Court can, and should, consider Mr. Geisen's candor in evaluating Mr. Geisen's overall character.

During the trial, the Court heard some of the government's witnesses, such as Steven Moffitt and Mark McLaughlin, vouch for Mr. Geisen's character. Mr. Moffitt testified that he believed Mr. Geisen was a man of honesty and integrity. Mr. McLaughlin testified that he trusted Mr. Geisen. These witnesses' observations of Mr. Geisen mirror impressions of him held

by many in the community. Some of those are captured in letters to the Court attached to this memorandum as Exhibit B.

Mr. Geisen's personal history is one of commitment to his family and service to his country and the communities in which he has lived. He graduated from Marquette University in 1982 and married his wife, Kathleen, that same year. Together, Mr. and Mrs. Geisen have three children: Ashley, Nicholas, and Meg. Mr. Geisen is actively involved in each of his children's lives and family friends speak extensively of Mr. Geisen's participation in his children's activities as they progressed from childhood through their teenage years. Their letters, attached as part of Exhibit B, demonstrate the profound positive impact Mr. Geisen has had on them throughout their lives.

Upon graduation from college, Mr. Geisen joined the U.S. Navy and was recruited into Admiral Rickover's Nuclear Navy, where he served for six years including five tours on the U.S.S. Nathaniel Greene. He attained the rank of Lieutenant and was honorably discharged in 1988 after receiving the Navy Achievement Medal, a Sea Service Ribbon with two Bronze Stars, a Submarine Designator Pin, and a Navy Recruiting Gold Wreath Award.

In 1988, Mr. Geisen joined FENOC and moved to Ohio. Over the next fourteen years, he was actively involved in many facets of the Perrysburg, Ohio community. He coached little league baseball for many years and eventually became Player/Personnel Director for Perrysburg Amateur Baseball/Softball Commission for the 1000+ ballplayer program. In Ohio, and later in Wisconsin, he coached youth hockey teams through the high school junior varsity level. He also served as a Cub Scouts den leader.

As the Court can tell from the foregoing history and from the letters of support attached as appendix B, Mr. Geisen is a man who has earned the respect and admiration of many through

his selflessness and his integrity. For those who know him, the fact that he stands convicted of a crime of dishonesty is unbelievable. But it does not diminish their regard for him or their admiration for what he has done for his family, his community, and his country. We ask that the Court keep that personal history in mind when fashioning its sentence.

C. The Impact of the Case on Mr. Geisen

In fashioning a sentence, the Court must also consider factors such as just punishment, deterrence, and correctional treatment of the defendant. 18 U.S.C. § 3553(a)(2). On these factors, the significant deprivations suffered by Mr. Geisen over the past four years as a direct result of the events at issue in this case weigh in favor of a probationary sentence.

As circumstances presented in the Report indicate, the fact of the indictment has already inflicted significant punishment upon Mr. Geisen. After leaving First Energy, Mr. Geisen moved to Wisconsin and took a job as Quality Assurance/Quality Control Manager at Kewanee Nuclear Power Plant. He held that position for close to three years without any inquiry from the NRC.

In November 2005, the government offered Mr. Geisen a Deferred Prosecution Agreement. He declined because he was unable to agree that he knowingly made false statements to the NRC. On January 3, 2006, the government contacted undersigned counsel again to inquire whether Mr. Geisen would accept the DPA. Again, Mr. Geisen declined. The next day, the NRC issued an Order immediately barring him from work in NRC-licensed activities. That Order resulted in Mr. Geisen's termination from Kewanee.

Mr. Geisen challenged the Order and demanded the immediate hearing to which he was entitled under NRC regulations. But the NRC Staff (the prosecuting entity for the Order) moved to stay the proceeding at the request of the Department of Justice pending resolution of the criminal case. The Licensing Board adjudicating the Order denied the Staff's first three stay

requests, noting that the NRC waited close to five years to bring the case and recognizing the significant impact the Order had upon Mr. Geisen's ability to maintain employment. Finally, after the U.S. Attorney for the Northern District of Ohio wrote a letter to the NRC Commissioners, the case was stayed on their order.

The financial impact on Mr. Geisen was severe. As the Report reflects, the Geisen's combined family income plummeted as Mr. Geisen sought to establish a business repairing refrigerator gaskets in commercial establishments. Their adjusted gross income dropped by half between 2002 and 2006, and their combined checking and savings account balances total around \$6,500 against \$72,000 in unsecured debts. Benefits that the Geisen's had received from Mr. Geisen's employer ended with his termination, including health insurance. The termination of that insurance was particularly damaging because in December 2004 doctors discovered a cancerous tumor around then-17-year-old Nicholas' heart. He underwent surgery and immediately embarked on a five-week chemotherapy regimen, followed by two years of treatment and monitoring. While the cancer is now in remission, the ordeal of dealing with Nicholas' sudden and unexpected diagnosis was exacerbated by Mr. Geisen's loss of employment and benefits.

In sum, this case has had a profound impact upon Mr. Geisen's life even prior to this Court imposing sentence. He has been barred from a line of work that he spent twenty years training for and participating in. After working for years as a nuclear engineer, he is now struggling to start a business installing gaskets in fast food restaurants. His net worth, and that of his family, has been slashed during a time in which the family has attempted to deal with health crises, college education costs, and other, more routine obligations. It is not an exaggeration to

say that Mr. Geisen has been decimated by this proceeding even before he faces the loss of his liberty.

IV. CONCLUSION

Before the Court stands a man with an exemplary personal history who was a model employee in the nuclear industry both before and after the events that led to his indictment and conviction. While the sufficiency of the evidence is an issue for another day, and now another Court, it is important to recognize that Mr. Geisen gained no personal benefit from his alleged conduct and that the evidence of intent and/or motive on his part was minimal. Mr. Geisen has suffered greatly for his role in the events at Davis-Besse, and will continue to suffer long-term employment disability and financial consequence. There is absolutely no plausible argument that he poses a threat to the community. We ask that the Court recognize the unique circumstances of this case and of this man and impose a sentence that accounts for his lifetime of service and contribution.

Respectfully Submitted,

s/Richard A. Hibey

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EXHIBIT C

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

3 UNITED STATES OF AMERICA,) Docket No. 3:06CR712
4 Plaintiffs,) Toledo, Ohio
5 v.) May 1, 2008
6 DAVID GEISEN,) SENTENCING
7 Defendants.)

8 -----
9 TRANSCRIPT OF SENTENCING HEARING
10 BEFORE THE HONORABLE DAVID A. KATZ
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript
produced by notereading.

1 COURTOOM DEPUTY: 3:06CR712 David Geisen,
2 sentencing.

3 THE COURT: Bear with me but a moment.

4 This is the sentencing hearing in United States
5 versus David Geisen, our case number 06CR712-01.

6 Are all counsel and the defendant ready to
7 proceed?

8 MR. HIBEY: We are.

9 MR. POOLE: Yes, Your Honor.

10 THE COURT: Have all counsel and Mr. Geisen
11 reviewed the presentence report, including all revisions
12 thereto and have you, Mr. Geisen, discussed it with
13 counsel?

14 THE DEFENDANT: Yes, Your Honor, I have.

15 THE COURT: Thank you. I presume then that all
16 counsel have reviewed it and I have your sentencing
17 memoranda and the objections contained at the final pages
18 of the report, am I correct?

19 MR. POOLE: Yes, Your Honor.

20 THE COURT: Then I will order the presentence
21 report finalized, to be placed in the record under seal.
22 If an appeal is taken in this case, counsel on appeal shall
23 be permitted access to the sealed report except as to the
24 recommendation section, which is to remain sealed.

25 It is my understanding that there are a

1 multiplicity of issues which are at -- still at issue, and
2 they are addressed in both the final presentence report
3 commencing at page 23 and in the presentence memoranda,
4 which has been filed by both the government and the
5 defendant. I am presuming that the first issue raised is
6 the issue raised by the government for enhancement pursuant
7 to guideline section 5.1.14. or is it 5.2.1?

8 MR. POOLE: 5(K).

9 THE COURT: I'm sorry, 5(K)2.14. I'll get it
10 correct. Would the government like to be heard or are you
11 resting to your memoranda which I have -- I want to, before
12 answering, I want to assure you that I have read the
13 presentence report. I have met by telephone and in person
14 with its writer. And I have read both memoranda by the
15 government and defense counsel a multiplicity of times.
16 But I welcome anything you might wish to add, which is not
17 contained in your memoranda.

18 MR. POOLE: I'll be brief, Your Honor. We submit
19 that this is an unusual case, in that the consequences of a
20 rupture in the nuclear reactor at Davis-Besse are a
21 consequence of the sort that it's reasonable to suppose
22 that the guidelines authors did not take into account in
23 devising the guidelines. There have been numerous studies
24 that said that the risk imposed was one of the more
25 significant -- made it of the more significance incidents

1 in the history of nuclear power in this country, and we
2 think an upward departure from the guidelines range is
3 merited by that.

4 THE COURT: Anything in addition to that which
5 was already submitted in your memorandum? And Judge, just
6 one quick observation, and that is that the government's
7 argument both in its memo which was filed after we filed
8 ours and today, I think, suggest that The Court is
9 confronting a different situation than what the facts show
10 The Court was confronting.

11 This case, as it pertained to Mr. Geisen, was not
12 about immediate public safety threat, and the fact that had
13 the condition gone on further and had a rupture occurred
14 and had the safety system at First Energy failed with --
15 and there's no suggestion that they would have, The Court
16 is simply not dealing with that issue here. And I think it
17 would be improper 5(K)2.14 deals with threats to the public
18 safety. And aside from the issues that were in play here,
19 the seriousness of them, what we submitted along with our
20 memo I think makes it abundantly clear that their public,
21 the citizens of Ohio, were not at risk.

22 Thanks to both of you. As I said at the
23 conclusion of the trial in this case, I have been rewarded
24 by the professionalism of all counsel. Our system of
25 justice has been so rewarded, and that carried throughout

1 to the presentence memoranda filed in this case.

2 Guideline section 5(K) 2.14 public welfare states
3 if national security public health or safety was
4 significantly in danger, The Court may depart upward to
5 reflect the nature and circumstances of the offense,
6 unquote. I've looked at this matter very carefully. The
7 government has requested this court to exercise its
8 discretion pursuant to that guideline section and enhance
9 Mr. Geisen's guideline level by 2 to a level 12. I choose
10 not to exercise my discretion as afforded me in this
11 guideline section and will not enhance for several reasons.
12 It is my recollection that there was no evidence produced
13 at trial which demonstrated that the -- that the safety
14 systems in place at Davis-Besse would have been
15 insufficient to stay off the dire consequence which the
16 government contends would have resulted from the incident
17 at issue had the NRC and the operator not intervened. As
18 noted by the defendant at page seven of his memorandum, and
19 by the attached letter from the then director, then
20 chairman, I'm sorry, of the NRC Nills J. Diaz (phonetic),
21 that was in an October 5, 2004 letter collected to the
22 Cleveland Plain Dealer. He stated, and I quote, the hole
23 in the head of the leak was an enormous failure on the part
24 of the licensee and of the NRC. I want to say that loud
25 and clear. I want to say equally loudly and clearly that

1 it was not close to being the impending disaster publicly
2 portrayed. It may be asked, aren't those two statements
3 inconsistent. They are not. In this case our preliminary
4 analysis indicates that the stainless steel liner of the
5 vessel head, thin as it was, was more than adequate to
6 contain the pressure generated within at -- and it would
7 have done so for quite a while. I am convinced that if the
8 liner had been breached, the layers of safety would have
9 protected the people of Ohio and that is the bottom line.

10 Further, the language used by The Sixth Circuit
11 in the Pluta case relied on by the government in urging the
12 application of this set -- this guideline section, does not
13 mandate the same result here as in that case. In Pluta,
14 the two level enhancement was, in part, justified by The
15 Court because the defendants, pardon me, criminal history
16 did not adequately reflect the seriousness of the
17 defendant's past criminal behavior. Hero -- here there is
18 no past criminal behavior in the record of any
19 significance. In granting a two-level departure, and I'm
20 quoting from page 977 of the official report, the district
21 court noted that four features of this case set it apart
22 from the guidelines, and the fourth was the third and
23 fourth, Pluta's lengthy and violent criminal history
24 demonstrated by his 25 criminal history points warranting
25 an upward departure pursuant to the then guideline and

1 Pluta's repeated violations of bond, probation and parole
2 provisions. In the case before me, I do not believe that
3 this guideline is appropriate for application here.

4 The government also argues that without a period
5 of incarceration there would not be adequate deterrence to
6 the criminal conduct here at issue and relies on section
7 A-2(B) of 3553(A) of Title 18. I will comment on that
8 later. But suffice to say that the recidivism that is
9 experienced because of past history should not be at issue
10 here because of this defendant's expulsion, if you will,
11 from the nuclear industry.

12 Moving to Mr. Geisen's objection, the first
13 objection is at paragraph 51, page 23 of the presentence
14 report. The -- there is an objection to the description in
15 paragraph 51 in the offense conduct section of the report,
16 and because of what I will discuss with respect to
17 objection number two I do not believe that that objection
18 is relevant and will move to the second objection.

19 That second objection is related to the report
20 and its recommendation for a two-level upward enhancement,
21 pursuant to section 3(B)1.1C. That section provides that
22 under the heading aggravating role, based on the
23 defendant's role in the offense increased the offense
24 levels as follows, (C) Quote, if the defendant was an
25 organizer, leader, manager or supervisor in any criminal

1 activity other than described in A or B increase by two
2 levels, unquote. Note that it says organizer, leader,
3 manager or supervisor in any criminal activity, not whether
4 he was a supervisor or manager in the facility, but whether
5 he was a manager, a director, if you will, in the criminal
6 activity. And I note also the application notes and in
7 particular application note four, quote, factors The Court
8 should consider include the exercise of decision making
9 authority, the nature of participation in the commission of
10 the offense, the recruitment of accomplices, the claimed
11 right to a larger share of the fruits of the crime, the
12 degree of participation in planning or organizing the
13 offense, the nature and scope of the illegal activity, and
14 the degree of control and authority over -- exercised over
15 others. It doesn't seem to fit, gentlemen. And I disagree
16 with its application.

17 One, the recruitment of accomplices. Nothing was
18 shown about recruitment of accomplices. There was no
19 evidence whatsoever of any monetary fruits or other fruits
20 of the crime, including an enhancement in his position with
21 the company. There was nothing shown about recruiting
22 others. There was -- there was -- and it was made clear by
23 the government that this was not a conspiracy charge.

24 If you move then to the background paragraph
25 which follows the application notice; however, it is also

1 likely that persons who exercise the supervisory or
2 managerial role in the commission of the offense, not in
3 the position in the industry, tend to profit more from it
4 and present a greater danger to the public and/or are more
5 likely to recidivate. I've already addressed that. The
6 defendant in this case -- well, first, there was no showing
7 or even allegation throughout trial of joint action or a
8 conspiracy which -- as to which the defendant would be
9 classified as a leader or organizer. On the contrary, this
10 defendant was shown to have made statements and signed
11 letters alone or approved letters. No conclusion, no
12 agreement, no direction to others to do or say something
13 misleading or incorrect to the NRC. No planning or share
14 or larger share of the fruits of the crime. Therefore, it
15 is my conclusion that section 3(B)1.1C should not apply,
16 and I will uphold the objection of the defendant
17 accordingly.

18 Moving to the third objection by the defendant as
19 the 3(B)1.3 abuse of a position of trust. That is
20 discussed by the probation officer writer of this on page
21 24. Quote, the defendant used his position and his
22 professional expertise to make false statements to FENOC
23 Company, Nuclear Review Board and the NRC. He was an
24 engineering manager and was entrusted by FENOC and the NRC
25 to be truthful when representing serious potential public

1 safety issues involving his area of knowledge and
2 authority. I think it fits. And I will deny or overrule
3 the objection of the defendant with respect to application
4 of guideline section 3(B)1.3.

5 The fourth objection by the defendant was as to
6 paragraph 89 of the PSR. That section was taken from court
7 documents and is merely a factual summary of the report
8 taken from those documents. It does not count as a
9 conviction for purposes of calculating the defendant's
10 criminal history, and I know of no reason to strike it from
11 the report, and therefore, I will overrule the defendant's
12 fourth objection.

13 I have received, I believe the count is 17
14 letters from the following individuals who I, in most part,
15 do not need to name. I received an excellent letter from
16 Mr. Geisen's wife explaining the family health issues which
17 have plagued them over the last years and the importance he
18 has played and continues to play in addressing those
19 issues. I have received letters from each of his three
20 children, Ashley, Nicholas and Meg, from his father, from
21 his former supervisor at Davis-Besse, from seven of his
22 close friends, from sister and two brothers, from his son's
23 doctor. These letters are all in support and paint the
24 same kind of picture of his relatively unblemished past as
25 painted by the PSR and in person to me by Mr. Butler. I

1 have read them all, and they confirm the assessment as set
2 forth in the PSR as to his character aside from his present
3 predicament as a result of the charges and jury verdicts in
4 this case.

5 I'll now hear from counsel for the defendant and
6 then the defendant with respect to sentencing unless there
7 is any other matter which I have neglected to this point.

8 MR. HIBEY: I'll be prepared to speak if you'll
9 indulge me one moment.

10 THE COURT: Of course.

11 MR. POOLE: I imagine The Court will reach this
12 later, but there was a recommendation for an occupational
13 restriction.

14 THE COURT: I will reach it. That is correct.

15 MR. HIBEY: Your Honor, in light of The Court's
16 rulings just made, I think we can abbreviate the statements
17 that we're prepared to make in this case. Same to verify
18 our own experience in representing Mr. Geisen, a
19 representation which, quite frankly, it was an honor to
20 conduct. He is the man you have come to understand through
21 your own experience of reading the presentence
22 investigation report and the testimonies, if you will, of
23 people who have written to The Court on his behalf.

24 I think about the only other thing I would want
25 to point out is that none of this needed to occur if he had

1 accepted an invitation at the beginning to sign a deferred
2 prosecution agreement, an agreement that simply required
3 him to admit that he had lied to the NRC in consideration
4 of which there would have been no criminal prosecution and
5 no urging upon The Court at this late juncture that he
6 should be -- he should have his liberty restricted by as
7 much as a year in prison.

8 I simply want to say that this is a man of
9 integrity. We don't stand here to seek to impeach the
10 verdict. We understand that that has played its course.
11 What I want to stress for The Court is that which I think
12 you already know. Dave Geisen is a good man, he's a good
13 family man, he is an excellent nuclear engineer. He served
14 with -- with distinction even after the Davis-Besse
15 incident for a period of three years -- almost -- I think
16 three years. I may have my timing wrong, three years after
17 the Davis-Besse incident and before the deferred
18 prosecution agreement arrangement was declined and the
19 prosecution of this case followed. I'm here to -- simply
20 to ask you when taking into consideration all of these
21 things and realizing that at a level eight you have
22 discretion to do a number of things that affect his
23 liberty, I'm asking you to impose a sentence of probation
24 for this man. The experience is on the record. Government
25 can claim that it has vindicated its interests. We are now

1 talking about an individual who simply does not deserve any
2 additional punishment or stress or loss of welfare or any
3 further infliction upon the family unit and what has been
4 experienced in recent years as a result of this case. And
5 so this is an appeal to the leniency that the law
6 recognizes, The Court has and to exercise that leniency by
7 imposing a probationary sentence on Mr. Geisen. I think
8 Mr. Geisen has something to say.

9 THE COURT: Thank you, Mr. Hibey. Mr. Geisen?

10 THE DEFENDANT: Yes, Your Honor. What I have to
11 say is not going to be an epiphany of any sort. I maintain
12 my innocence and I always have. Almost two-and-a-half
13 years ago I had the opportunity to make all this go away,
14 and so with that in mind I'd like to apologize to my family
15 and friends for having to put them through this. However,
16 at that time and I still feel to this day that had I signed
17 that deferred prosecution agreement, the person that I
18 would have had to deal with day in and day out would be
19 looking my own self in the mirror knowing that I had taken
20 the easy way out, and certainly the alternate path would
21 have been anything but easy. I do regret everything that
22 had happened at Davis-Besse. I do take responsibility that
23 I should have done a better job as in my role there, or I
24 do maintain that at no point did I mislead the government.
25 And I also go on record of saying that I appreciate the

1 efforts that the jurors went through during this time frame
2 because I could see the look in their eyes, I could see the
3 difficulty at which they were trying to weigh the evidence,
4 and I don't envy ever being put into their position.

5 That's all I have to say, sir.

6 THE COURT: Thank you.

7 MR. POOLE: Your Honor, we're -- were the
8 government to make its recommendations purely on the basis
9 of Mr. Geisen's character as it's been expressed over the
10 years and as relationships with others setting aside the
11 events of this case, our recommendation might be different.
12 But the United States and this court also must consider
13 these things. The nuclear industry is heavily regulated
14 because nuclear power is potentially very dangerous. The
15 safety -- well, the regulatory system depends on licensees
16 and its employees providing complete and accurate and
17 truthful information. And without that integrity, it
18 cannot protect the safety of the public. So the United
19 States and this court we believe must address the question
20 of deterrence. We're at a cross roads in this country
21 where we're on the verge of licensing a wave of new nuclear
22 power plants, an expansion of nuclear power in this
23 country. And we submit that deterring conduct of the sort
24 that Defendant Geisen has been convicted of is an important
25 public policy goal. And we believe The Court should take

1 that into consideration also in its sentence.

2 THE COURT: Thank you very much. With respect to
3 the sentencing of Mr. Geisen, it appears to me that the
4 probation office and officer have analyzed it almost
5 completely in consonant with my own feelings. I want to
6 formally confirm that all objections by the parties are
7 overruled except for that with relation to 3(B)1.1C, which
8 is granted, and for all of the reasons I previously stated
9 on the record.

10 Therefore, I will sentence Mr. Geisen at a level
11 eight with a criminal history category one. That results
12 in a period of incarceration of zero to six months and is
13 in zone A wherein subject to the exercise of the discretion
14 of The Court, probation is available. I want to
15 acknowledge that this was a long and contentious trial in
16 which one of the co-defendants was exonerated completely by
17 the jury, and in which the jury obviously had a difficult
18 time with both defendants and convicted Mr. Geisen on three
19 of the five counts charged in the indictment. I do not in
20 any way depreciate the tremendous service of that jury nor
21 its verdicts.

22 As I've previously noted in a memorandum opinion,
23 the issue of a new trial motion with respect to Rule 33 and
24 setting aside the verdict with respect to Rule 29 was well
25 briefed, well argued and a difficult and close issue for

1 The Court. And I have made my ruling.

2 In reviewing this matter for sentencing under 18
3 United States Code, Section 3553-A, I must note several
4 things, some of which have already been noted on the record
5 through memoranda, others have been alluded to by Mr. Hibey
6 this afternoon. As noted at Page 26 paragraph at my report
7 from the probation officer, Mr. Geisen is a college
8 educated engineer with a masters degree in business.
9 Distinguished military service in the Navy, married for 25
10 years, three children, all adults. He was employed as an
11 engineer, as an engineering manager in Ohio and Wisconsin
12 and the NRC removed his license as a result of the instant
13 offenses. He currently operates his own business and his
14 wife is employed. There are no substance abuse or mental
15 health issues in his background. The loss of his license
16 is the greatest punishment other than a felony record. It
17 is both an economic and a career blow and removes him from
18 the opportunity for recidivism in the nuclear industry for
19 the period he is prohibited from engaging in work in that
20 industry. The jury's verdict as to three offenses, it is
21 true that those verdicts were of serious charges
22 considering the health and safety of the public in any
23 community with a nuclear power plant. It appears clear
24 that Davis-Besse should have been shut down for repairs and
25 was allowed to operate perhaps in an unsafe way, but we

1 must remember the then chairman's letter to the Cleveland
2 Plain Dealer. And that operation was continued due in some
3 significant measure to the false statements attributed by
4 the jury to this defendant. There may have been, if one
5 speculates, and I am not, but -- but the press and others
6 have, others involved in this issue; however, it is the
7 defendant who is found guilty for his own involvement. And
8 that drives the need for sentence. I have said this before
9 and it bares repeating because of the government's
10 statement both orally and in writing, the removal of
11 Mr. Geisen from the industry is a death net to his career,
12 perhaps not only in the nuclear industry but elsewhere. It
13 is in that industry where he has labored most of his adult
14 life and which, as noted previously and in the report, he
15 had an exemplary record until the incident which is the
16 subject matter of this case. It is a serious financial
17 blow to both the defendant and to his family. The need for
18 the sentence to reflect that seriousness and to attempt to
19 prevent recidivism has been considered by me at length and
20 will be reflected in the sentence which I announce.

21 I have reviewed all of the elements of 3553-A and
22 the result weighs heavily in favor of the sentence I will
23 pronounce, which sentence is consistent with that
24 recommended by the probation officer and the probation
25 department of this court. I will now pronounce that

1 sentence after which both the defendant and the government
2 will have an opportunity to comment and object.

3 Pursuant to the Sentencing Reform Act of 1984 as
4 amended, it is my judgment that the defendant, David
5 Geisen, be and hereby is placed on a term of probation for
6 three years on each of the three counts to be served
7 concurrently. The defendant shall report to the United
8 States probation office in the Eastern District of
9 Wisconsin within 72 hours on or before the end of the day
10 on Monday next.

11 Additionally, he shall pay a fine in full in the
12 amount of \$5,000 for each count for a total of \$15,000
13 through the clerk of the United States District Court.
14 Assuming he may be unable at this time to pay that
15 immediately, the balance shall be paid at the minimum rate
16 of 10 percent of the defendant's gross monthly income.
17 Notwithstanding establishment of a payment schedule,
18 nothing shall prohibit the United States from executing or
19 levying upon the property of the defendant discovered
20 before or after the date of this judgment.

21 He shall also pay to the United States a special
22 assessment of \$100 per count or a total of \$300, which is
23 due and payable immediately. While under supervision the
24 defendant shall not commit another federal, state or local
25 crime, shall not illegally possess a controlled substance,

1 shall comply with the standard conditions which have been
2 adopted by this court and with each of the following
3 additional conditions. He shall be barred from being
4 employed in the nuclear power industry during his period of
5 probation. The -- while the periodic -- pardon me, the
6 periodic drug testing mandated by the Violent Crime Control
7 and Law Enforcement Act of 1994 is hereby suspended because
8 I find that this offense is not drug related and this
9 defendant has no current or past history of substance
10 abuse. The defendant shall participate in the home
11 confinement program of electronic monitoring for a period
12 of four months to commence no later than 30 calendar day --
13 days from sentencing. He shall be required to remain in
14 his residence unless given permission in advance by his
15 probation officer to be elsewhere. He may, of course,
16 leave his residence for work, to receive medical treatment
17 and to attend religious services.

18 He shall wear an electronic monitoring device,
19 follow electronic monitoring procedures and submit to
20 random drug or alcohol tests as specified by his probation
21 officer. He may participate in the earned leave program
22 under terms set by his probation officer. He is permitted
23 to be elsewhere than I have indicated previously in this
24 sentencing order if approved by his probation officer. He
25 is to pay the cost of home confinement with electronic

1 monitoring, and that payment is to be made as directed by
2 his supervising home confinement officer. He shall not
3 possess a firearm, destructive device or any dangerous
4 weapon. He shall provide his probation officer with access
5 to any requested financial information. Mr. Geisen shall
6 not incur new credit charges or open additional lines of
7 credit without the prior approval of his probation officer.
8 Mr. Geisen shall perform over the period of his term of
9 probation 200 hours of community service as directed by his
10 probation officer. Should he receive financial windfall,
11 he shall apply all monies received there from, including
12 from tax refunds, lottery winnings, judgments and/or any
13 other anticipated or unexpected financial gains to the
14 outstanding court ordered financial obligations created by
15 this order.

16 And finally, Mr. Geisen shall cooperate with his
17 probation officer in the collection of DNA as directed by
18 that officer. Any objections to the form of the sentence
19 or to the sentence?

20 MR. POOLE: Not from the government, Your Honor.

21 MR. HIBEY: Well, I think before it's officially
22 imposed, will The Court entertain any argument with respect
23 to any of the elements, any of the constituent parts of
24 this sentence?

25 THE COURT: That's why I asked the question.

1 MR. HIBEY: Well, in that respect then I'd like
2 to ask The Court's indulgence for a moment and then address
3 you.

4 (A brief discussion was had off the record
5 among defense counsel and defendant.)

6 MR. HIBEY: If I may, Your Honor. Your Honor, we
7 would ask you to take into consideration the following, The
8 Court has articulated the imposition of a fine, some
9 \$15,000, which I would hope you appreciate is a
10 considerable financial burden on an already burdened --
11 economically burdened family and business. That -- I can
12 speak to that alone but then I want to speak about its
13 relationship to the home confinement element of the -- of
14 the sentence, which The Court also pronounced.

15 As you know from the presentence report,
16 Mr. Geisen enjoyed a certain economic benefit when he was
17 employed in the nuclear industry. That was at a time when
18 the children were younger than they are now. The two of
19 the three children are, in fact, in college. They are in
20 the midst of the entire four year undergraduate program at
21 their respective institutions, and these are obligations
22 which Mr. Geisen now continues to shoulder even as he
23 embarks on trying to build a business that would sustain
24 him and his family. That business is repairing gaskets in
25 restaurants. He repairs gaskets in pizza ovens. Now, that

1 work, which is how he makes his living these days, requires
2 him to travel, by his estimate and I think it's a good one,
3 4 to 5,000 miles a month. He travels over a period of a
4 number of states throughout Wisconsin for sure and I think
5 that the -- that the bail agency or whatever, the
6 overseeing authority is -- would confirm that as a matter
7 of fact when the terms of his bond, I'm really calling back
8 the things now that I have a minute to review in the terms
9 of his bond were set before the magistrate some years ago,
10 I think we took into accounts the fact that he had a wide
11 area within which he was required to travel. Indeed, I'm
12 told --

13 THE COURT: Excuse me, let me interrupt you.

14 MR. HIBEY: Please.

15 THE COURT: That's why the exception for leaving
16 for work I anticipated that that would include his need to
17 travel. All he need do is the same thing that he would do
18 otherwise and advise his probation officer if he's going to
19 be gone for periods of time. That does not restrict his
20 travel.

21 MR. HIBEY: Well, the way I heard the sentence,
22 it read, I guess it might read differently when it's
23 written, that it was imposing on him the restriction of
24 home confinement and that it was an exception to the home
25 confinement condition that he would have to obtain

1 permission under the probation office.

2 THE COURT: No, it says except for work.

3 MR. HIBEY: So that exception need not be aired
4 with the probation if he has to go to -- if he has to go to
5 western Wisconsin, for example. When he travels to western
6 Wisconsin, because that apparently, I don't know the
7 geography of Wisconsin, puts him overnight. Would that --
8 what would that mean in light of this sentence?

9 THE COURT: The sentence will be clarified when
10 written to include what you have just articulated, and I
11 will ask Mr. Butler to draft a sentence which will cover
12 that. I don't believe it to be necessary, but out of an
13 abundance of caution will include.

14 MR. HIBEY: Then I'm back to the fine. It's a
15 substantial amount of money, and I don't know that there is
16 any sophisticated way of presenting the point to you other
17 than to say this man is on his heels economically, is going
18 to be for quite some time. Would The Court consider a
19 lesser fine than the one imposed? I think the points that
20 have been made in The Court's expressing its rationale for
21 the sentence to be imposed do not lose any of their force
22 in the circumstance such as this.

23 Now, the -- if this man were at the same economic
24 level that he was before this whole thing was visited upon
25 him, that -- that may make for a far more difficult

1 argument than perhaps an -- indeed a more principled one on
2 my part which I wouldn't advance about the heftiness of
3 this fine. But Your Honor, we have a different situation
4 here. He's still got to educate his kids. He still has to
5 repair his pizza oven gaskets. He still has to make that
6 business work, and it is all done by the sweat of this man.
7 And to -- to, you know, to I mean, we're going to --
8 there's going to be a restriction of his liberty, we
9 understand that.

10 THE COURT: Rick? Oh, over here. Fine.

11 (A side bar conference was had off the
12 record.)

13 THE COURT: The Court has been made aware of a
14 couple of things. As a result of Mr. Hibey's relatively
15 persuasive, I said relatively persuasive argument with
16 respect to the financial condition of his client and the
17 government has indicated their understanding of that
18 situation, the fine has been assessed not as a confiscatory
19 effort on the part of The Court, but to make the point of
20 the jury's conviction.

21 After a consideration of the financial condition
22 and obligations, both the government and The Court have
23 agreed to reduce the fine in this case to \$2,500 per count
24 for a total of \$7,500, payable at a 5 percent level, and it
25 must be understood that if the fine is not paid in full

1 during the period of probation, the balance becomes the
2 obligation of the United States Attorney's Office to
3 collect.

4 Do you understand that, Mr. Geisen?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: Am I correct in my assumption,
7 gentlemen?

8 MR. POOLE: Yes, Your Honor.

9 MR. HIBEY: Yes, Your Honor.

10 THE COURT: Thank you. Therefore, that will
11 amend The Court's sentence. Is there anything else with
12 regard to the sentence as to which either the government or
13 the defendant find an objection is appropriate in their
14 opinion?

15 MR. HIBEY: We seek a clarification, Your Honor.
16 With respect to the condition of sentence relating to
17 Mr. Geisen's ban from the industry during the period of
18 probation. There are a couple of factors here that I wish
19 to bring to The Court's attention on the record.
20 Mr. Geisen's occasion of his declination to accept the
21 deferred prosecution agreement was debarred by the NRC
22 without a hearing in January of '06, and was, therefore,
23 from that point forward, removed from the -- from the
24 industry. The matter was contested by us, Mr. -- before
25 the nuclear regulatory commission licensing board. That --

1 that matter after, I think, three or four attempts by the
2 commission staff and in collaboration with prosecutors, was
3 finally stayed by the order of the commission, overruling
4 the licensing board which wanted to go forward. So we are
5 in that situation where he is barred as we speak and has
6 been barred for a number of years. There may be occasion
7 for the licensing board to take this matter up again after
8 a stay has been lifted. And my -- my concern is that the
9 condition imposed by The Court as one of the elements of
10 its sentence today might operate as a res judicata to
11 prevent the licensing board and those who live in the
12 nuclear regulatory world from taking a decision about the
13 suitability of Mr. Geisen to be permitted back into the
14 business, the industry, the subject area for which he has
15 been trained and has spent virtually his entire adult life.
16 So Your Honor, is there a possibility that The Court would
17 consider some kind of clarification with respect to the ban
18 that you are talking about, for example, giving him credit
19 for the ban that has occurred so far, and rather than
20 imposing a -- a ban that runs for the term of his probation
21 allow that any further consideration about his eligibility
22 to return to that industry be left for a determination by
23 the professional court of a -- of a nuclear regulatory
24 commission's licensing board? I appreciate what The Court
25 has done, and I'm grateful for its consideration with

1 respect to this business of the fine. I don't mean to
2 depreciate anything associated with the rationale for this
3 sentence. I am still dealing and must deal with the human
4 factors aspect of this. I would like to think that this
5 man has a chance to do something more than repair gaskets
6 in pizza ovens for the rest of his working life. He's a
7 young man, brilliantly educated, beautifully trained. The
8 verdict says he made a -- he committed a crime. I'm not
9 even going to talk about a mistake or anything like that.
10 He committed a crime. And we're dealing with it as we have
11 been dealing with it.

12 But, you know, there has to be -- there has to
13 be -- there has to be a future here. And you're at a
14 critical juncture in this man's life where you can
15 determine that. And I would just ask you to lift that road
16 block to do something with that particular element of the
17 sentence that allows us not to return immediately because
18 we still have to deal with the NRC and we have to litigate
19 and we have to put up with whatever they say as their
20 evidence why it should be banned. But at least let us do
21 it there rather than simply have it done here.

22 THE COURT: Mr. Poole?

23 MR. POOLE: Your Honor, we think you got it right
24 when you imposed the three-year ban on employment in the
25 industry. The Court was careful to note that it felt that

1 the sentence it was imposing was sufficient for deterrents
2 and the other purposes under 3553(A) because this
3 individual is not going to be working in the nuclear
4 industry because it cut him off from that likelihood. For
5 that reason, we think that The Court's statement with
6 respect to the occupational restriction was correct and
7 should not be changed.

8 MR. HIBEY: Your Honor, you know, it's not as
9 though we're flying blindly here. There was a period of
10 time when First Energy terminated his relationship with
11 Mr. Geisen and he went to work at another power plant and
12 he was there for three years. And his work there
13 terminated only because of the eventuation of these
14 proceedings.

15 Now, I have not heard, and no evidence has been
16 presented on this record that would suggest that the public
17 health and safety or the potential for re -- or that a
18 recidivist act occurred during those three years. The man
19 performed his job according to the standards. And no one
20 was at risk, and no one was harmed. And the only reason
21 why that ended is because of this case.

22 THE COURT: It appears to me, while I respect
23 your position and that of Mr. Geisen, and I know it has had
24 and will continue to have an adverse impact on his family
25 and that's what I took into consideration with respect to

1 the fine and so did the government. I am not going to
2 change my order with respect to the three-year ban
3 coincidental with the three-year term of probation.
4 However, I point out to you and to Mr. Geisen and to the
5 government that that is not to say that if Mr. Geisen, for
6 instance, were to be reinstated by the NRC and had the
7 opportunity for reemployment that this court would not do
8 what it does in most cases, and that is the probation
9 officer, when he is requested or she is requested for a
10 change in the terms and conditions of probation must seek
11 the approval of The Court for that change. The Court would
12 then, in a case like this, hold a hearing to consider that
13 probation officer's request. Now, it may be the request of
14 the probation officer, or it may be a request of the
15 defendant probationer. But in either event, it comes to
16 this court. And at that time the decision will be made.
17 Not at this time except as noted subsequent to announcement
18 of the sentence originally, the sentence as originally
19 given but as amended shall be imposed immediately.

20 Mr. Geisen, it's my obligation to tell you that
21 you have the right to appeal your conviction if you believe
22 that there was some irregularity in your case or if you
23 believe there is other grounds for appeal. You also have
24 the right to appeal your sentence under certain
25 circumstances, particularly if you feel that the sentence I

1 have announced is contrary to statute, or the guidelines.
2 Any such appeal must be filed within ten days after this
3 matter is placed of record through a judgment entry, which
4 will be on or before the close of business on Monday next.
5 That appeal is commenced by filing in the clerk's office on
6 the first floor of this courthouse a notice of appeal. If
7 it is your desire to appeal, you are to inform your
8 attorneys. They will remain your counsel at least through
9 the ten-day period for filing that notice of appeal and
10 will do so at your behest or direction. If at the time of
11 appeal you cannot afford an attorney on appeal and can
12 qualify for appointment of counsel, that will be a matter
13 before the United States Court of Appeals for the
14 Sixth Circuit.

15 Thank you.

16 I'll order that a written record of my reasons
17 for and statement of sentence be provided to the probation
18 office, both here and in Wisconsin.

19 Is there anything further from the government?

20 MR. POOLE: No, Your Honor.

21 THE COURT: From the defendant?

22 MR. HIBEY: No, Your Honor.

23 THE COURT: Thank you. Thank you very much.

24 That concludes this hearing.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

Angela D. Nixon, RPR, CRR

Date

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