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NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
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Docket Number: IA-050-052; ASLBP No. 06-845-01-EA

Location: (telephone conference)

Date: Monday, July 21, 2008

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
PRE-HEARING CONFERENCE

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In the matter of : Docket No. IA-050-052
DAVID GEISEN :
: ASLBP No. 06-845-01-EA
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Monday, July 21, 2008

The pre-hearing conference came to order
at 9:30 a.m. via telephone in room T3 B51 of White
Flint Two.

BEFORE:

MICHAEL C. FARRAR, CHAIRMAN

E. ROY HAWKENS, CHIEF ADMINISTRATIVE JUDGE

NICHOLAS G. TRIKOUROS, ADMINISTRATIVE JUDGE

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APPEARANCES:

ON BEHALF OF DAVID GEISEN:

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ALSO PRESENT:

JOHANNA THIBAUT, BOARD LAW CLERK

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

2 (9:29 a.m.)

3 JUDGE FARRAR: All right, then, if everyone
4 is ready let's go on the record.

5 This is the sort of rebirth of the David
6 Geisen matter, the challenge Mr. Geisen brought to the
7 enforcement order issued by the staff growing out of
8 the Davis-Besse proceeding, or Davis-Besse incident.

9 I'm Mike Farrar. I'm the chairman of the
10 licensing board.

11 With me at our headquarters chambers is
12 Judge Roy Hawkens. For those of you who are wondering
13 why he is not the chairman may recall when this case
14 started he was the licensing board judge like the rest
15 of us, and after that was appointed chief judge.

16 He has elected to stay in the second
17 chair; traveling today, and phoning in from a distant
18 location is our colleague Nick Trikouros; also with us
19 in the chambers is Joanna Thibault, our law clerk, and
20 Eric, our court reporter is here.

21 Mr. Hibey, who is there for you?

22 MR. HIBEY: Andrew Wise, Your Honor.

23 JUDGE FARRAR: Okay. And Ms. Clark, would
24 you state again who you have there with you.

25 MS. CLARK: Kimberly Sexton , Nancy Del

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1 Costillo, and Shahrar Ghasdimian -- excuse me, we are
2 just joined also by Cynthia Carpenter who is from our
3 office of enforcement.

4 JUDGE FARRAR: Okay. I welcome you, Ms.
5 Clark, welcome you back to the case. And all your
6 colleagues there, we are glad to have them on board.

7 As our order of July 17th poses some
8 questions indicated, the last page indicated, our goal
9 here is to ask a lot of questions about where the
10 proceeding is headed.

11 The fact that we ask a question doesn't
12 mean we are committed to the idea embedded in that
13 question, so feel free to challenge anything we say as
14 not an appropriate way to go. But we thought rather
15 than waste time later on misguided efforts, we would
16 try to ferret out all the difficulties in this
17 somewhat unusual case now.

18 Mr. Hibey, you had -- well, let's talk
19 first about the transcript. You had volunteered to
20 provide us the transcript of the criminal case. Does
21 the staff have any objection to us having that and
22 reviewing it?

23 MS. CLARK: Your Honor, this is Lisa Clark.

24
25 We believe that the criminal transcript is

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1 not relevant to the proceeding that is currently
2 before the board.

3 Therefore, to the extent that Mr. Hibey
4 would like to place portions of the transcript into
5 the record we would ask that he identify those
6 portions that he seeks to have admitted into the
7 record, and explain their relevance; and that we be
8 afforded an opportunity to respond with any objections
9 on relevance.

10 JUDGE FARRAR: Mr. Hibey, what do you think
11 of that?

12 MR. HIBEY: I can tell you right now what
13 we'd want to put in, if that helps?

14 JUDGE FARRAR: Yes, without too much
15 detail.

16 MR. HIBEY: Just five points, Your Honor.

17 JUDGE FARRAR: Okay.

18 MR. HIBEY: Witness testimony; arguments of
19 counsel, in closing; discussions regarding the jury
20 instructions; post-trial pleadings; and materials
21 regarding sentencing.

22 JUDGE FARRAR: The first two you mentioned
23 seem like don't they cover everything?

24 MR. HIBEY: No. There are opening
25 statements, there are selection of the panels, there

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1 are legal arguments that were made pretrial. There
2 were hearings on an issue of the conference of the
3 experts that the government offered. None of that is
4 included in the submission that we believe is relevant
5 to the court's -- the panel's determinations.

6 JUDGE FARRAR: Okay, but essentially, when
7 I used the word, everything, I didn't make it clear
8 enough, essentially you'd have in front of us
9 everything that involved matters that transpired
10 before the jury?

11 MR. HIBEY: Yes.

12 JUDGE FARRAR: Everything the jury heard,
13 you would put in front of us?

14 MR. HIBEY: Yes. Yes.

15 JUDGE FARRAR: Okay, Ms. Clark, how does
16 that affect --

17 MR. HIBEY: In those first two categories.

18 JUDGE FARRAR: Right.

19 Ms. Clark, how does that affect the
20 position you took?

21 MS. CLARK: Our position is that the only
22 matter that is currently before the board is the
23 sanction that was imposed in our enforcement order.
24 That sanction was premised upon the violations that
25 are identified in the order, and not on any aspect of

1 the criminal proceeding.

2 And for that reason we don't see that any
3 of that information is relevant to the matter which is
4 going to be adjudicated in this proceeding.

5 JUDGE FARRAR: Let me ask you this, then,
6 what you are saying is that in effect when Mr. Hibey
7 says he is not going to contest the facts, the
8 uncontested facts are not the indictment, the counts
9 of the indictment that the jury found Mr. Geisen
10 guilty on, but the uncontested facts are the terms of
11 the enforcement order?

12 MS. CLARK: That's correct.

13 JUDGE FARRAR: Mr. Hibey, what do you think
14 about that?

15 MR. HIBEY: Well, I think that the notion
16 that we are not contesting the facts of the order is
17 not a complete statement of the situation. What we
18 are doing are now advancing facts relevant to the
19 question of what penalty this panel ultimately affirm
20 or enforce relative to Mr. Geisen.

21 So this is not a full blown argument,
22 regarding his innocence of any accusation made by the
23 staff. Our focus is on the question of the
24 reasonableness of the penalty the staff has imposed
25 and wishes to continue to impose.

1 JUDGE FARRAR: But doesn't the
2 reasonableness of that penalty depend on the shading
3 or the context that you give those uncontested facts?
4 The bare bones uncontested facts may be that he made
5 a false statement to the NRC, but in order to
6 determine the reasonableness of the penalty, don't we
7 have to say, well, what kind of statement was that?
8 What context was it? How important was it?

9 MR. HIBEY: That's correct.

10 JUDGE FARRAR: Okay, but then that begins
11 to get into the underlying facts not being
12 uncontested.

13 MR. HIBEY: Well, I think, Your Honor, the
14 underlying facts are appropriately subject to your
15 consideration, shall we say, de novo, but in the
16 context of what we are actually contesting here. We
17 don't expect that at the end of this proceeding the
18 panel would have an epiphany that said, this guy was
19 not guilty of the offenses for which he was ultimately
20 convicted, any more than we expect them to say that he
21 was innocent of the charges for which he was
22 acquitted, because that also happened.

23 But what we are asking the court to do is
24 on the basis of a developed record that goes to the
25 very factual contentions made by the staff before this

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1 particular panel is how reasonableness is it that he
2 should have imposed upon him this five-year ban that
3 was imposed in January of '06.

4 So I think that therefore, within the
5 confines if you will and the context of the issues
6 that we are advancing today before this board, very
7 different from the ones we were advancing when we were
8 before you a couple of years ago, is how reasonable is
9 this penalty. And how reasonable and fair is it, and
10 here is the record that has been developed that the
11 court should take into account when trying to
12 determine that issue.

13 JUDGE FARRAR: Well, let me make sure I
14 understood. You are not taking the very simplified
15 position that would make the proceeding in front of us
16 very simple: You're not saying that you will give us
17 everything that the staff has in its enforcement
18 order, and even given that five years is too much,
19 something else is appropriate. That's not your
20 position?

21 MR. HIBEY: That's correct.

22 JUDGE FARRAR: And Ms. Clark, you heard Mr.
23 Hibey's argument. What do you think?

24 MS. CLARK: I believe that we cannot
25 confuse the criminal case with the civil proceedings

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1 that is before this Agency.

2 The only matter that is before this Agency
3 is the enforcement order that was issued by the staff,
4 which contains two elements.

5 First, it sets forth the violation that
6 Mr. Geisen was charged with; and secondly it sets
7 forth a sanction for those violations.

8 And fundamentally the only matter before
9 this board is the validity of that enforcement order,
10 and that includes both aspects. If Mr. Hibey were to
11 challenge the order, then the hearings should proceed
12 as to all the factual underpinnings of that order.
13 And the only relevance of the criminal case is to the
14 extent that certain aspects of the order have been
15 adjudicated in the criminal case, and therefore he is
16 estopped from challenging them before this board.

17 But the concept that we would somehow look
18 at the record of the criminal proceeding and assess a
19 penalty based on that just really doesn't make any
20 sense to me.

21 JUDGE FARRAR: Then --

22 MR. HIBEY: So are we going to have a full
23 blown trial, is that it?

24 JUDGE FARRAR: Let me phrase this question.
25 You, Mr. Hibey, are not willing to let us take the

1 staff enforcement order as a given and just figure out
2 the penalty.

3 Staff has said I think you are free to
4 challenge the enforcement -- before I ask you the
5 question, Ms. Clark, suppose Mr. Hibey says, okay, I
6 kind of change my position, I'm going to challenge the
7 enforcement order, then you would interpose an
8 objection that at least to some extent he is estopped
9 from doing so by the commission?

10 MS. CLARK: Yes, we believe that under
11 collateral estoppel a large portion of the violations
12 would be considered subject to collateral estoppel.

13 JUDGE FARRAR: Okay, here is the problem
14 I'm beginning to have, I think I can speak for my
15 colleagues on this, that if we try to proceed on the
16 basis just outlined, we spend far more time arguing
17 over each point of evidence, whether it did involve a
18 matter that was estopped or not, than if we found some
19 other way of doing this.

20 Mr. Hibey, you have been in a lot of
21 criminal cases, cases of this nature, tell me what you
22 are thinking about.

23 MR. HIBEY: Well, I'm a little baffled by
24 the position of the staff. They are saying that there
25 is an operative collateral estoppel that disposes of

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1 the entire case.

2 JUDGE HAWKENS: No, I don't believe they
3 said that, Mr. Hibey. They said only charges for
4 which he was convicted, that may operate on some of
5 the underlying facts.

6 JUDGE FARRAR: That was Judge Hawkens.

7 MR. HIBEY: I heard that, Your Honor. I
8 think that that's where we are getting a little bit
9 into an analytical problem.

10 My colleague, Mr. Wise, is here, and if
11 you don't mind I think he could capture what we'd like
12 to say in that regard.

13 JUDGE FARRAR: All right, go ahead, Mr.
14 Wise.

15 MR. WISE: And certainly stop me if I'm
16 straying too far into the substance; it's not my
17 intention.

18 But the issue that makes this complicated
19 is that the way that the criminal trial came in, and
20 the instructions that the jury was given in terms of
21 how they could consider Mr. Geisen's guilt and
22 innocence, revolves primarily on an issue of a jury
23 instruction they were given about willful blindness or
24 deliberate indifference -- I'm blanking on the exact
25 wording that was used -- presented the jury with a

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1 fundamentally different theory of his potential
2 liability than the staff's order, more than the
3 original criminal indictment that accompanies it.

4 So the suggestion that he would be
5 collaterally estopped from challenging factual
6 allegations I don't think is true in this situation,
7 and it certainly doesn't fit jurisprudence on why
8 collateral estoppel is a viable tool in this
9 situation.

10 JUDGE FARRAR: Let me interrupt you, Mr.
11 Wise. I don't think Ms. Clark said that everything
12 you would want to do would be collaterally estopped.
13 She said that some things would. Is that right, Ms.
14 Clark?

15 MS. CLARK: Yes, that's correct.

16 JUDGE FARRAR: Then I think if that is true
17 then I think where we are lurching to is a very
18 complicated, very complicated matter of trying to
19 define before the hearing just what is the reach of
20 collateral estoppel, given the slightly different or
21 perhaps largely different nature of the charges and
22 nature of the jury instructions. Then it's going to
23 be incumbent on us with the help of the two parties to
24 define before the trial here is the reach of estoppel,
25 and here is what's not. If we don't do that before

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1 the trial we are going to have an impossible time at
2 the trial because we will be stumbling from pillar to
3 post trying to define things as we go along.

4 Mr. Hibey, do you see a ready alternative
5 to proceeding the way I just described?

6 MR. HIBEY: No, given the position of the
7 staff, I think that is probably the way we'll have to
8 go.

9 JUDGE FARRAR: I have been known even
10 recently to be critical of the staff. But let's not
11 blame them for that position. I didn't hear anything
12 unreasonable coming from them.

13 Ms. Clark, the system I just described,
14 does that make sense to you where we try to define the
15 reach of collateral estoppel in advance?

16 MS. CLARK: I think that makes sense, and
17 I agree that it will probably be time consuming and
18 complicated. I don't know, it may -- it may be an
19 option that maybe the parties could discuss this
20 between themselves and see if we could maybe stipulate
21 to certain issues as to collateral estoppel.

22 I don't know, from what Mr. Wise said, I
23 don't know if they are going to argue that nothing is
24 collaterally estopped. But that might -- if they are
25 open to that option maybe that might be a possibility.

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1 JUDGE FARRAR: Could you agree even further
2 if you were -- if both sides chose to enter those
3 discussions and not only agree on what is collaterally
4 estopped, but agree on a statement of facts that you
5 would submit to us, say take these facts as given,
6 what's the right penalty? Ms. Clark, would you be
7 interested in that? Or is that, the more you try to
8 bite off with this the more difficult and time
9 consuming any negotiations would be?

10 MS. CLARK: I would say that we'd be open
11 to at least pursuing those possibilities.

12 JUDGE FARRAR: Mr. Hibey, what do you think
13 of that, trying to talk to the staff about an
14 agreement about what is collaterally estopped, plus
15 perhaps an agreement on what the underlying facts are
16 that you want to present to us?

17 MR. HIBEY: Well, I don't think we can
18 decline to participate in the exercise, although I'm
19 not sanguine about the results. I think that is
20 something that we could undertake to do, and do it
21 promptly.

22 JUDGE FARRAR: Right, maybe that is
23 something -- right, there is no sense spending a long
24 time doing that if it's fruitless. I would suggest
25 you spend a short time seeing if you could come up

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1 with something, and if not, we will have to have some
2 kind of prehearing proceeding where we get briefs from
3 both of you and we come out with some decision saying
4 here is what we think is collaterally estopped, and
5 what isn't.

6 So let's hold that idea for a moment as a
7 possibility.

8 Looking at our order, down to number
9 three, what impact if any is the fact that you have
10 the criminal appeal pending have to do with this? If
11 we do a collateral estoppel type exercise, and then
12 you prevail on appeal, Mr. Hibey, what is your thought
13 of what that would -- you know, suppose we did a
14 collateral estopped exercise and went ahead with our
15 hearing and determined that picking a number out of
16 the air which has no bearing on anything I've ever
17 thought of, 3-1/2 years was the right term for a ban,
18 and then you won the appeal, would you be back here
19 saying you want a new kind of hearing where you are
20 not collaterally estopped?

21 MR. HIBEY: Well, I suppose it would depend
22 on how we prevailed on appeal. And everyone would
23 then have to take into account what the ruling of the
24 circuit is, and how it impacts what has transpired.
25 It's conceivable that if we won outright on issues

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1 involving the sufficiency of evidence, then perhaps
2 the government, both the Justice Department -- well,
3 the Justice Department would have no choice in the
4 matter, but the staff may reconsider where it is.

5 If it orders a new trial I think we have
6 to see what that means in the light of things.

7 And of course there is also the continuing
8 passage of time. Now, that therefore could happen.

9 That's about all I can say in that regard,
10 Your Honor.

11 JUDGE FARRAR: Ms. Clark, would you agree
12 that anything we do would have to kind of remain alive
13 pending the outcome of the criminal case?

14 MS. CLARK: Yes, to the extent you rely on
15 collateral estoppel, I agree that Mr. Geisen could
16 come back and ask for some kind of relief if there is
17 a significant change on appeal.

18 JUDGE FARRAR: All right, thank you.

19 Let's get to the fourth question, the
20 matter of how -- let's assume we can solve all these
21 evidentiary problems that we just talked about; we
22 need to come back to those to see exactly how we are
23 going to go about that; what standard do we use in
24 determining the reasonableness of the punishment
25 imposed?

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1 Assume we all agreed on the facts, the
2 underlying facts as to liability, what standard do we
3 apply? We cited for you the old Atlantic Research
4 Corporation case.

5 Ms. Clark, let me ask you first since that
6 case of course also involved the staff, what the
7 staff's view is on the standard of review?

8 MS. CLARK: The staff's view is that for an
9 order the question is whether the facts and the order
10 are correct, and whether the remedy is supported by
11 the facts.

12 So the staff does have the burden of
13 persuasion, and must demonstrate that our sanctions
14 were justified and reasonable based on the facts as
15 set forth in the order.

16 And we believe that if we satisfy that
17 burden the board should not set aside our sanctions.

18 JUDGE FARRAR: But do we look at that de
19 novo, or do we give you some deference like a court of
20 appeals would give a licensing board -- or like a
21 court of appeals would give a district court on
22 factual findings?

23 MS. CLARK: We believe that the best view
24 is that the board should afford the staff deference,
25 since the staff has a certain amount of discretion in

1 assessing the penalty.

2 JUDGE FARRAR: That's not what the Atlantic
3 Research case said, or the position the staff took
4 there, is it?

5 MS. CLARK: It is not.

6 JUDGE FARRAR: Are you going to say there
7 is a statute of limitations of 28 years on staff
8 positions?

9 MS. CLARK: No, I would not say that. And
10 we recognize that in particular with civil penalty
11 cases the board has frequently applied a de novo
12 standard, and we recognize that that has happened as
13 well in enforcement cases which involve orders.

14 However, there is a case, Oncology
15 Services, that is also an older case, 1994, but in
16 that case, the board did discuss the difference
17 between the regulations and statutory authority
18 underlying the issuance of orders versus the issuance
19 of civil penalties, and that case set forth the
20 standard that if it's an order, it should be whether
21 the facts in the order are true, and whether the
22 remedy is supported by those facts.

23 JUDGE FARRAR: What's the citation of
24 those?

25 MS. CLARK: That is 39 NRC 11.

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1 JUDGE FARRAR: Okay.

2 Did the -- that's a board decision, not a
3 Commission decision?

4 MS. CLARK: Yes.

5 JUDGE FARRAR: In your quick research have
6 you found that the Commission has spoken to this?

7 MS. CLARK: Well, several penalties cases
8 it did address a similar issue. In the TVA case, in
9 that case --

10 JUDGE FARRAR: That was the whistleblower
11 employee?

12 MS. CLARK: Right. And the Commission said
13 that there was a de novo standard, but that was
14 limited to civil penalty cases.

15 JUDGE FARRAR: Right. And so civil penalty
16 meaning monetary amounts you view as different from
17 employment bans?

18 MS. CLARK: Yes.

19 JUDGE FARRAR: Okay. Mr. Hibey, what are
20 your thoughts on this?

21 MR. HIBEY: I have none. In terms of
22 discussing those cases, we feel having read the
23 petition cited in the order, that that comports with
24 what we would have argued anyway, namely that in the
25 area of penalty imposed, the panel should apply a de

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1 novo standard to reach its own conclusions as to
2 whether the penalty imposed here was a reasonable one.

3
4 JUDGE FARRAR: If we do that, Atlantic
5 Research mentioned the fact that the staff had a
6 manual out that talked about different factors on
7 civil penalties. Where -- most of our work does not
8 involve the question of how long a person should be
9 banned for a misdeed. Where do we draw substantive
10 standards as to appropriateness of penalties?

11 MR. HIBEY: Well, I think that is where you
12 apply a standard of fairness, taking into account the
13 record of the case.

14 The record of this case is embodied not
15 only in materials that we identify when we address
16 question number one, but also with respect to the
17 disposition of cases as to the other figures in the
18 story, for example, Masun Goyal, who testified under
19 immunity at trial, and who as far as I can determine,
20 because it was very interesting testimony, was
21 basically a government witness who was supporting the
22 government theory of the case, received I think a one-
23 year ban, where he had admitted that he had lied to
24 the NRC.

25 So it seems to me that you should have

1 the flexibility that due process affords you to apply
2 question of fairness and to do so with full effect of
3 your own, of the panel's own sense of what is fair and
4 what is reasonable in what was done here.

5 JUDGE FARRAR: Ms. Clark, what do you think
6 about that?

7 MS. CLARK: Well, our enforcement policy
8 sets forth nine specific factors that staff considers
9 in assessing sanctions against individuals, and those
10 are set forth in Section 8, under the enforcement
11 actions involving individuals.

12 And so those really are the factors that
13 the staff --

14 JUDGE FARRAR: Section 8 of --

15 MR. HIBEY: Section 8 of what?

16 MS. CLARK: It's entitled Enforcement
17 Actions Involving Individuals.

18 MR. HIBEY: Section 8 of what? I didn't
19 hear that.

20 MS. CLARK: This is the NRC's enforcement
21 policy.

22 JUDGE FARRAR: And that is found where?

23 MS. CLARK: It used to be a NUREG. Now you
24 can find it on the website under the enforcement
25 section.

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1 JUDGE FARRAR: Okay. Now would that be
2 like the document referred to in the Atlantic Research
3 Corporation case where Judge Rosenthal, after headed
4 toward a de novo review, said I think that that
5 doesn't mean the staff policy is so much wasted ink;
6 it means that that is something we look at and take
7 some guidance from.

8 Does that same formulation apply to this,
9 or would you argue that it should be given more
10 credence than that?

11 MS. CLARK: My recollection is that was
12 considered merely staff guidance, whereas the
13 enforcement policy is adopted by the commission. So
14 the enforcement policy is actually afforded more
15 weight.

16 JUDGE FARRAR: It was adopted by the -- but
17 it's not regulation?

18 MS. CLARK: No, but it is -- it is endorsed
19 by the Commission. It doesn't represent merely staff
20 guidance.

21 JUDGE FARRAR: So this is different from
22 one of those things we deal with on the merits of
23 licensing cases, standard -- the standard review?

24 MS. CLARK: I believe so. I have to go
25 back -- I don't recall where in the case law I saw

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1 that, but my recollection was that this was afforded
2 greater weight.

3 JUDGE FARRAR: Okay, if you could pursue
4 that for the benefit of the board and Mr. Hibey
5 whether this was -- you know, short of a regulation,
6 has some sort of formal Commission endorsement that
7 would be helpful to us.

8 MS. CLARK: Okay.

9 JUDGE HAWKENS: Ms. Clark, Roy Hawkens
10 here. Do you agree with Mr. Hibey that in addition to
11 looking at the reasonableness of these nine factors as
12 it applies to a particular individual, the staff would
13 also be required to address the application of
14 sanctions to other individuals, where the sanction
15 looks to be significantly different although the
16 offense is fairly similar? In other words you'd have
17 to distinguish other cases to demonstrate the
18 reasonableness of the sanction of Mr. Geisen.

19 MS. CLARK: Well, first of all our
20 enforcement sanctions are decided on a case-by-case
21 basis. So as a general matter the staff does not look
22 to consistency in itself between enforcement
23 sanctions.

24 And I think that it can be very misleading
25 to attempt to challenge an enforcement sanction based

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1 on a superficial comparison, because there are many
2 factors, many individual factors, that apply and
3 distinguish one enforcement case from another.

4 JUDGE HAWKENS: I agree with what you just
5 said, and isn't the answer to that that it should not
6 be a superficial comparison, to the extent Mr. Hibey
7 raises a case that he says, look, this demonstrates
8 that the sanction on Mr. Geisen was unjust and
9 unreasonable. You simply need to look beyond the
10 surface of the case which he brings to our attention
11 and distinguish it for us.

12 MS. CLARK: Yes, that is absolutely true,
13 and I think that when you talk about these
14 distinctions, you have to bring them back to the
15 factors. So in other words, for example the first
16 factor is the level of the individual within the
17 organization. And so Mr. Geisen is of course a
18 manager. And to compare him to the sanction imposed
19 for an individual who is not a manager clearly is not
20 -- is comparing apples to oranges.

21 JUDGE FARRAR: Ms. Clark, what I'm hearing
22 you say now is, when you premise this discussion by
23 saying you don't look for consistency, what you really
24 meant is, you don't look for superficial consistency,
25 but if one guy gets one year and another guy gets five

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1 years you would be able to explain on the basis of
2 factors individual to each case why one was
3 appropriate, one year was appropriate, and one five
4 years was appropriate?

5 MS. CLARK: That's correct.

6 JUDGE FARRAR: Okay.

7 Mr. Hibey, do you have any disagreement
8 with the staff approach framed that way?

9 MR. HIBEY: Well, I think the staff has
10 basically supported what I was saying, that is, that
11 within the case itself and without going elsewhere to
12 look up how other cases had been disposed of, but
13 within the case itself, if there are distinctions,
14 then they should be brought to the attention of the
15 panel in deciding the question of the fairness and
16 reasonableness of the penalty that the panel is now
17 being asked to uphold.

18 So I'm not hearing in principle anything
19 that is different than what I was saying would be
20 relevant to the panel's consideration. All I'm
21 hearing is that they will argue that they didn't have
22 to be consistent, and that their interpretation of a
23 group of factors will demonstrate that there is a
24 reason for distinguishing between Mr. Goyal, who
25 admitted that he had lied to the NRC, getting one

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1 year, and Mr. Geisen getting five.

2 JUDGE FARRAR: All right, as long as we are
3 talking about other people who were involved and
4 charged, what if anything do we draw from the fact
5 that the company paid something like I think it was a
6 \$30 million fine? And let me explain my question in
7 a little more detail.

8 When you work in a company, regardless of
9 your rank, the company culture in terms of the stated
10 and unstated directions you get may have an influence.
11 Some companies might say in this situation we'd like
12 to keep this reactor running but don't ever ever
13 mislead the NRC. Tell them the absolute truth. Where
14 some company officers might say, listen, it's really
15 important to the performance of the grid, to our
16 bonuses, that we keep this place running, and do
17 anything -- let's do everything we can to keep it
18 running.

19 Now you could say, well, an employee ought
20 to react the same. An employee always has to do the
21 right thing. And drawing on current politics, we'd
22 all like to think that if we were John McCain, and we
23 were offered early release from the prisoner of war
24 camp, we would have done just like he did, and say,
25 nope, I won't take the early release; it's not my

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1 turn. But none of use know how we're going to act
2 until that situation happens.

3 To what extent does our decision on Mr.
4 Geisen turn on what the culture of the company that he
5 was operating in? Mr. Hibey, why don't you address
6 that first?

7 MR. HIBEY: Well, I suppose if there was
8 evidence of the existence of a culture that was
9 practiced and conveyed, and therefore became part of
10 the knowledge and attempt of the parties before the
11 panel, then there may be sufficient connectivity to
12 impute that culture to him.

13 That said, I can tell you on the basis of
14 the record as we'd like to have it put before you,
15 there was absolutely no such evidence adduced, and we
16 are not aware of any.

17 Especially as related to Mr. Geisen.

18 JUDGE FARRAR: No, no, I'm talking about
19 evidence adduced about -- so you are saying there is
20 no evidence in the criminal record of what the company
21 culture or directions were?

22 MR. HIBEY: Oh, that is correct.

23 JUDGE FARRAR: So you are not going to
24 present to us any evidence that to the extent he erred
25 or made a mistaken statement, it was as a result of

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1 pressure put on him by superiors? You say there is
2 going to be no such argument in this case?

3 MR. HIBEY: That is correct. That is
4 correct, Your Honor.

5 JUDGE FARRAR: And so, okay, Ms. Clark, is
6 that your assessment of the record?

7 MS. CLARK: Yes, it is.

8 JUDGE FARRAR: Okay, then, I suppose you
9 can argue this next question is irrelevant. I ask it
10 only on my own behalf. What do we do with the fact
11 that the company paid a \$30 million fine, and that
12 none of its top individuals were prosecuted or charged
13 by the staff?

14 MS. CLARK: Well, on behalf of the staff,
15 I don't believe that is of relevance to the
16 appropriate sanction to be imposed against Mr. Geisen.

17
18 MR. WISE: This is Andy Wise again. I
19 think especially having had the conversations that we
20 had with the jury, we would love to engage in that
21 discussion with the board for weeks on end if you
22 would indulge us. But I think we actually agree with
23 Ms. Clark. I don't think that that issue necessarily
24 is one that is relevant to Dave Geisen's individual
25 situation. I mean I think there are policy

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1 discussions that we would love to engage in about the
2 fairness of how this whole process has gone down.
3 There are questions about whether or not the staff was
4 focused on the right people, and the DOJ for that
5 matter.

6 The company's decision to pay the fine is
7 motivated by so many factors that are extraneous to
8 Dave Geisen that I don't think it really does a lot of
9 good to go down that rabbit hole.

10 JUDGE FARRAR: All right, then, since you
11 are both in agreement, let's adopt that view at least
12 tentatively for now that we have Judge Trikouros from
13 another phone, so we have had no chance to really
14 consult with each other on what we think, so we will
15 keep that a tiny bit open. But for now, since that is
16 the position both of you are taking.

17 JUDGE HAWKENS: And Judge Hawken here.
18 Mr. Wise, I appreciate your candor there.

19 MR. WISE: Absolutely, Your Honor.

20 JUDGE FARRAR: What if anything do we make
21 when we had a question there about whether Mr. Geisen
22 would testify at the hearing. First, Mr. Hibey, even
23 if everyone agreed they wanted him to, would there be
24 a reason because of the -- he did not testify in the
25 criminal case, or did he?

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1 MR. HIBEY: He did testify in the criminal
2 case.

3 JUDGE FARRAR: Okay, so there is no lurking
4 Fifth Amendment privilege here?

5 MR. HIBEY: Well, actually there is, and
6 I'm just speaking now analytically. Because I think
7 the Fifth Circuit, and to the extent that issues
8 percolate through the Commission up into the Fourth
9 Circuit, they operate under what we call the separate
10 proceeding rule, which allows a party who has
11 testified in one proceeding to continue to invoke the
12 privilege in another.

13 But putting aside that and leaving it to
14 a case where it may have more consequence, he has
15 testified, and I suppose if called upon here, he might
16 conclude that he wishes to testify here.

17 Since we have not consulted on the
18 subject, and we don't know how the issues are going to
19 be framed, because we are in this preliminary period
20 right now, we don't want to make an outright
21 commitment to his appearance, but we can say that very
22 much so we will consider his giving testimony in this
23 one.

24 JUDGE FARRAR: Let me ask both counsel if
25 neither of you chose to call -- you know, depending on

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1 -- we have a lot of work to do to define what this
2 hearing is actually going to be about, based on the
3 earlier discussion this morning. If neither of you
4 decided to call him, but the board thought it was
5 important for purposes of deciding on the
6 appropriateness of the penalty to hear from him, would
7 the board have the authority to ask you to call him?

8 MR. HIBEY: Oh, I think the board has every
9 right to ask us, and we certainly -- certainly would
10 be taking that into account.

11 JUDGE FARRAR: Before you go, Mr. Hibey,
12 let me see if the staff agrees with you. Because they
13 tend to take a more jaundiced view of the board's
14 authority.

15 Ms. Clark?

16 MS. CLARK: Oh, I agree that the board has
17 the authority to do that, and also one of the elements
18 that we take into account in determining sanctions is
19 the attitude of the wrongdoer.

20 JUDGE FARRAR: Okay, thank you, then we'll
21 hold that for later as well.

22 Mr. Clark, Mr. Hibey had, I think in one
23 of the documents he had submitted to us, or maybe it's
24 in the sentencing argument before the District Court,
25 cited former Chairman Diaz for, if I can paraphrase,

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1 for assuring the citizens of Ohio that this wasn't a
2 terrible threat to their safety.

3 What do we do with that statement?

4 MS. CLARK: Your Honor, are you asking
5 staff?

6 JUDGE FARRAR: Yes.

7 MS. CLARK: Certainly that letter was a
8 factor that was considered in the criminal case. If
9 we were to go forward with a hearing on the sanctions,
10 we would present testimony as to the safety
11 consequences of the event at Davis-Besse. And we
12 would be prepared to discuss that letter, and the
13 staff's view of the safety significance of the Davis-
14 Besse event.

15 JUDGE FARRAR: You are not collaterally
16 estopped from going behind the statement of a former
17 chairman of the commission issued in his official
18 capacity?

19 MS. CLARK: No, we don't believe so.

20 MR. HIBEY: May I inquire, Your Honor,
21 whether the holding of Judge Katz at the sentencing
22 that based on the DI's statement there was no case
23 made for danger to the community made by the
24 government, would that have collateral consequences in
25 the proceeding here?

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1 JUDGE FARRAR: That's a fair question, Mr.
2 Hibey.

3 MR. HIBEY: Perhaps, Your Honor, we should
4 leave it as a rhetorical one. But let me assure you
5 that it is not a hypothetical. Judge Katz very
6 categorically rejected any argument on the basis of
7 safety. And as I recall sustained every objection
8 when the government tried to go in that direction
9 during the trial.

10 This is a perfect example of why it is we
11 feel the record is important to the court's
12 consideration of the reasonableness of the penalty to
13 be imposed on Mr. Geisen, and the idea of them coming
14 in now to contradict the Chairman Diaz I think is
15 something we will object to if they try.

16 MS. CLARK: May I respond to that, Your
17 Honor?

18 JUDGE FARRAR: Certainly, Ms. Clark.

19 MS. CLARK: First of all in the criminal
20 proceedings, I believe the reason that evidence was
21 not presented on safety consequences was because the
22 judge felt that it would be prejudicial to the jury,
23 and that they would be too much swayed by the actual -
24 - actually the very dramatic significance of the event
25 at Davis-Besse.

1 And for that reason no evidence was
2 presented concerning the safety significance during
3 the criminal trial. Obviously, therefore, there was
4 no final judgment as to safety significance, and Judge
5 Katz' statements were based only on this very limited
6 amount of information, which is the letter of Chairman
7 Diaz, which was basically just a letter to the editor
8 of the local newspaper there. I mean it hardly
9 represented a full or complete statement or assessment
10 of the staff's determination of safety significance.

11
12 And I'd also like to point out that the
13 most important factor to the staff in assessing the
14 sanction here was in fact the safety significance of
15 the event. And to me, this highlights the reason why
16 the transcript in a criminal case, which is completely
17 independent, separate and apart from the -- any
18 adjudicatory proceeding in the civil case, cannot be
19 relied on as the basis to determine the sanction.

20 JUDGE FARRAR: Hold on, Mr. Hibey, I can
21 understand the latter part of your statement, Ms.
22 Clark. But I have a concern that you have a little
23 too glibly dismissed the statement of the chairman of
24 the Commission. Yes, it didn't come up in an
25 adjudicatory context, but the chairman speaks with the

1 Commissioners, and you work for the Commissioners, and
2 we get reviewed by the Commissioners.

3 And so I think we may need to hear a
4 little more later on, maybe in terms of briefs, if
5 your position is going to be that this did not get a
6 lot of credence in front of us.

7 MS. CLARK: Well, just to be clear, I'm not
8 saying that this should be given credence, but it has
9 to be placed in context. This is a very short
10 statement, and it is absolutely accurate to the extent
11 that it goes.

12 But there is much more to the safety
13 significance than what is contained in this letter to
14 the editor.

15 JUDGE FARRAR: Mr. Hibey, we'll hear from
16 you briefly on this.

17 MR. HIBEY: Yes, I think Chairman Diaz'
18 statement binds the Commission, number one.

19 Number two, Ms. Clark has failed to
20 mention that the judge made a specific holding, not at
21 the trial itself but at the time of sentencing, when
22 the government again attempted to advance a safety
23 argument in aid of asking the court to impose a one-
24 year jail sentence on Mr. Geisen.

25 And the court directly rejected that

1 argument and cited specifically and read into the
2 record Chairman Diaz' statement which appeared in the
3 newspapers of Ohio.

4 So I think that -- the idea that now they
5 are going to come in and suggest something different
6 is I think unfair.

7 JUDGE FARRAR: Well, I think this is
8 something -- we appreciate the positions both of you
9 are taking. This is something I need we'll need short
10 briefs on.

11 And speaking of short briefs, I'm remiss
12 in not again complimenting you, both sides as we did
13 in our written order, for the thoroughness of the
14 analysis and the reasonableness of the analysis, no
15 posturing, getting right to the heart of the matter in
16 the very short and quick written papers you filed with
17 us.

18 And I think that should be the norm moving
19 forward.

20 Let me ask a couple of other questions
21 about the reasonableness of the penalty.

22 To what extent will we be called upon to
23 read anything into the fact that Mr. Geisen didn't
24 take the deal the government offered him? I mean you
25 can look at that two ways, that he was absolutely

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1 convinced of his innocence and may still be; or that
2 he still doesn't get it and wanted to fight even
3 though he was wrong.

4 Those are the two extremes. Will we be
5 called upon by either party to read anything into the
6 fact that he didn't take that deal? Or is that just
7 something that we put aside?

8 MR. HIBEY: Well, this is Dick Hibey, this
9 is certainly something we are going to bring to your
10 attention. And we are going to add to that the fact
11 that at the sentencing, there was no two-point
12 reduction for acceptance of responsibility.

13 Now, that is I think an important fact.
14 What prosecutors normally do is argue that the person
15 is remorseless, and if one were to take a look at the
16 record of the case, one would not find that he was
17 remorseless. He may not have accepted, and continues
18 not to accept any responsibility for the crimes of
19 which was ultimately convicted. But he has, he did in
20 his testimony before the court, before the jury and
21 again before the court, accepted responsibility for
22 mistakes that he made in connection with the story of
23 this case, and that I think is something that the
24 court could properly take into account when deciding
25 the reasonableness of the penalty that ultimately you

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1 all have to decide.

2 JUDGE FARRAR: Ms. Clark, what are your
3 thoughts on that?

4 MS. CLARK: I agree that Mr. Geisen's
5 acceptance of responsibility is a relevant factor to
6 be considered. And to the extent that evidence is
7 entered into the record that goes to that factor, it
8 may well be admissible. It depends on the particular
9 evidence and whether it goes to that factor.

10 JUDGE HAWKENS: Ms. Clark, Roy Hawkens
11 here. Can I go back to the safety significance issue
12 we were discussing a few minutes ago?

13 And I want to see if I understood you
14 correctly when you said you were precluded by the
15 district court judge from putting in all the evidence
16 you wished to put in regarding the safety significance
17 of what occurred at Davis-Besse?

18 MS. CLARK: My understanding is that DOJ
19 was precluded from bringing evidence of the safety
20 significance of the event into the criminal trial
21 based on the judge's determination that it would be
22 prejudicial.

23 JUDGE HAWKENS: Mr. Hibey, do you agree
24 with that?

25 MR. HIBEY: Judge, Mr. Andy Wise can speak

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1 to that, Your Honor.

2 MR. WISE: Judge, this is Andy Wise.

3 I think Ms. Clark doesn't have the full
4 picture of it, in large part because there were a lot
5 of discussions that happened off the record and not in
6 open court so she wouldn't have heard them.

7 The judge's conclusion at the end was that
8 the prejudicial value of telling a jury that there
9 might have been a mushroom cloud over Davis-Besse,
10 which is how they would have heard it, was
11 significant; and that given that the government could
12 not make the case that had there been a breach of the
13 liner that the safety systems wouldn't have prevented
14 such an event, that the probative value of that
15 evidence was virtually nil, and the prejudicial value
16 was huge.

17 And in that calculus, he wasn't going to
18 let it in. But a big part of that was his conclusion
19 that the government couldn't make out the case that
20 the public was in danger, in part because of Chairman
21 Diaz' statement -- in large part because of Chairman
22 Diaz' statement -- but in part because he didn't want
23 to have a mini-trial on what would have happened had
24 the water been breached. And in part it was because
25 DOJ conceded that there was no evidence that the

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1 safety systems would have failed behind the initial
2 event.

3 So it wasn't simply that he said, I think
4 this is too prejudicial even though I think there is
5 evidence of it. His conclusion was quite clearly that
6 the government couldn't come close to establishing any
7 probity to the evidence, and it did have the real
8 prospect of prejudicing the jury unreasonably.

9 And that was where he came out on that
10 issue.

11 JUDGE HAWKENS: That's helpful. Thank you.

12
13 JUDGE FARRAR: Let me ask one more question
14 about the reasonableness of the punishment, and let me
15 state that I have not checked this with my two
16 colleagues so this question is just clearly coming
17 from me.

18 Sometime ago we said Mr. Geisen should in
19 front of us get the immediate hearing that the
20 regulations entitle him to. The Commission eventually
21 disagreed and said that the needs of the Department of
22 Justice in the criminal case overrode that, and
23 obviously we accept that ruling.

24 But in doing so you could look at it and
25 say, well, the Commission put the needs, correctly put

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1 the needs of the Department of Justice in the criminal
2 case ahead of Mr. Geisen's interests in this case.

3 But they didn't say that it won't hurt his
4 interest in this case, because in fact he's now had 2-
5 1/2 years of a five-year penalty already served.

6 Does the fact that he did not get the
7 immediate hearing that he otherwise would have been
8 entitled to should that fact at all weigh on our minds
9 in assessing the reasonableness of the penalty?

10 Ms. Clark?

11 MS. CLARK: I don't believe so. I believe
12 that we should look to the facts as set forth in the
13 order, and determine whether the staff judgment as to
14 the sanctions was justified based on the factors that
15 are set forth in the Commission's enforcement policy.

16 JUDGE FARRAR: So how the government
17 behaved toward him, I'm thinking now of the analogy to
18 Fourth Amendment cases where the criminal goes free
19 because the policeman erred in collecting the
20 evidence, you don't see that kind of analogy in this
21 case, that he didn't get his immediate hearing, and so
22 the fact that he's suffered under that wrong since the
23 time of the Commission's order, that doesn't count as
24 part of his punishment?

25 MS. CLARK: We don't believe that he has

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1 suffered under a wrong because we believe our sanction
2 was justified. Further --

3 JUDGE FARRAR: Wait, wait, there is a
4 difference between giving someone a five-year sanction
5 and letting them challenge it, and giving them a five-
6 year sanction and making them serve let's say for sake
7 of example making them serve five years while they are
8 bitter because they never got their hearing.

9 You are not suggesting nothing happened to
10 him by the fact that he didn't get his hearing?

11 MS. CLARK: No, I'm not suggesting that.
12 But what I'm saying is that -- well, first of all he
13 did have an opportunity to challenge the immediate
14 effectiveness of the order, and he chose not to do
15 that.

16 JUDGE FARRAR: Way back in the first five
17 or 10 days or whatever the reg says.

18 MS. CLARK: Right. And yet he has now
19 served 2-1/2 years, that's true. We believe that our
20 sanction was justified, and that at the conclusion of
21 this hearing the board will agree with us.

22 JUDGE FARRAR: So you don't give any weight
23 to the deprivation of a hearing? That is a value
24 enshrined in our law, and not getting what you
25 otherwise are entitled to, even if you are guilty.

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1 Even if we say at the end, this guy is guilty, the
2 staff correctly gave him five years, you don't think
3 that the deprivation of a hearing counts?

4 JUDGE HAWKENS: Or Ms. Clark, is it fair to
5 say that he has not been deprived of a hearing, and he
6 has not been deprived of anything to which he is
7 entitled?

8 MS. CLARK: Exactly. He will get his
9 hearing in due course, and we believe that the hearing
10 will justify our sanction, and that ultimately there
11 will be no deprivation from that aspect.

12 JUDGE FARRAR: Mr. Hibey?

13 MR. WISE: This is Andy Wise again. I
14 think our view is that it is a consideration, and
15 we'll urge the board to remember as they weigh, as you
16 weigh the various factors.

17 There is no question that he was affected
18 by his inability to immediately challenge the fact
19 allegations. I know the Commission reversed course on
20 this in their final order, but in their first order
21 they recognized that he lost his job because of the
22 order. We think that is supported by the record, and
23 when the Commission changes its view on that in the
24 second, we believe that change was made in error.

25 Regardless of our analysis on that point,

1 he lost his job and didn't have the ability -- he lost
2 his job because of the order and didn't have the
3 ability to challenge it expeditiously as he should
4 have been able to do.

5 And we think that that is a factor. And
6 even if we are arguing that at a point where there is
7 some consideration of whether the staff has sustained
8 its burden, whether or not someone has suffered a
9 loss, and what they have labored under, is a factor
10 for the body to consider.

11 It may not be dispositive, but it
12 certainly is a factor in trying to determine whether
13 this man has suffered as a result of the events at
14 hand.

15 JUDGE FARRAR: All right, well, thank you
16 both for your thoughts. This may be another one that
17 we want you to put your thoughts in writing at a later
18 stage.

19 I know Judge Hawkens has an appointment
20 shortly, as does Judge Trikouros, so let's see if we
21 can't finish up a bit before 11:00.

22 Question B goes to the nature of the bar,
23 and we can perhaps hold that for discussion later if
24 they have to leave.

25 But let's come back now to how given all

1 this discussion -- again, I thank you for the
2 excellent thoughts you have given to us, and again
3 reassure you that our questions don't indicate
4 commitment to any particular direction -- is the best
5 way to proceed to give you all a couple of -- well, I
6 know, the staff's -- I'm sorry, I should have said
7 this before -- the staff said they could have their
8 mandatory disclosures ready by Labor Day or something.

9
10 Mr. Hibey, do you need those? I was under
11 the assumption that any discovery that needed to be
12 done was done. Do you need those documents?

13 MR. WISE: Judge, I think a lot of it
14 depends on where our discussions this week go in the
15 collateral estoppel issues. I think --

16 MR. HIBEY: Yeah, Your Honor, we saw this
17 as a hearing that would come on with shall we say
18 deliberate speed, and that the need for additional
19 discovery was minimal.

20 If the disclosures that the staff has in
21 mind go to this issue of danger to the -- I'll call it
22 danger to the community, or the safety issue, then it
23 seems that that is a matter that is going to have to
24 get ruled on by the panel, and it should be ruled on
25 as soon as possible. Because I think it's a factor

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1 that needs to be addressed if that is where they are
2 coming from with their disclosures.

3 And if that gets out, if that is ruled out
4 of the case, for one reason or another, then I would
5 say we should be about the business of scheduling a
6 hearing and going forward as quickly as possible.

7 JUDGE FARRAR: What was the date the staff
8 was going to have its disclosures? Was that the 5th,
9 Ms. Clark?

10 MS. CLARK: I believe that is correct. Now
11 that is assuming that the only issue that is going to
12 hearing is on the sanctions. So obviously if
13 depending on our discussions, and if we need to go
14 forward on the underlying facts that support the
15 violation we would have to adjust our schedule
16 accordingly.

17 JUDGE HAWKENS: This is Judge Hawkens.
18 From what I heard in today's discussion, there are
19 genuine disputes about material issues going to the
20 facts underlying the violations.

21 I don't know how many disputes there are,
22 but as I read the NRC's staff's response, they were
23 approaching this with the understanding that the
24 violations as alleged in the staff order were not
25 going to be challenged.

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1 But it sounds to me, Mr. Hibey, like to
2 the extent that that was their understanding, they
3 were under a misimpression; is that right?

4 MR. HIBEY: Well, I -- I don't know, Your
5 Honor, to be candid with you.

6 JUDGE HAWKENS: Okay.

7 MR. HIBEY: I think that I have heard
8 enough here today to see that it warrants our having
9 to sit down and talk to the staff about what they want
10 to put forward, and what we want to put forward, and
11 see to what extent that has the kind of implications,
12 legal implications, that we have been talking about.

13 As you can see from the way we conceive
14 this thing going forward, we weren't looking to do
15 any discovery. We really just want to get into court
16 with you, with the record as it has been developed,
17 argue the reasons why we think the penalty going
18 forward is unreasonable, and to take into account, or
19 ask you to take into account all the indicia of
20 fairness and unfairness that we think might influence
21 your ultimate decision.

22 That's a, shall we say, that's not us
23 arguing all the facts, and all the evidence. It's
24 really focusing on the imposition of the penalty.

25 But what it is they want us to concede is,

1 I suppose, something that we need to talk about in
2 order to have a clearer picture of whether our view of
3 how this hearing should go down should prevail.

4 JUDGE FARRAR: Mr. Hibey, is what you just
5 -- your motivation if I can paraphrase to get on with
6 this quickly and simply, which is kind of what your
7 letter and paper to us said, and what you said in the
8 last few minutes, is that motivated by considerations
9 of time, money, one, the other?

10 MR. HIBEY: All, all of it. You know,
11 time, we could get -- we could get stretched out here.

12
13 JUDGE FARRAR: Right, and I understand what
14 is underlying this.

15 MR. HIBEY: And the money is clearly a
16 factor. And --

17 JUDGE FARRAR: Is the money such --

18 MR. HIBEY: What we are hoping is
19 accomplished here is that if we can persuade the panel
20 that he has been punished shall we say enough by the
21 debarment that has transpired, we have been invited
22 by the trial judge to return to him after a
23 disposition before you to ask him to reconsider the
24 ban that he imposed, which is a three-year ban on
25 this, Mr. Geisen's employment, in the nuclear industry

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1 at all.

2 And we are very anxious to do that,
3 because we feel that notwithstanding the judge's past
4 imposition of that ban, his willingness to reconsider
5 it once you all have decided your piece of this makes
6 us want to get on with it so we can get back to Judge
7 Katz if it is appropriate to do so with all deliberate
8 speed.

9 JUDGE FARRAR: When I mentioned money I had
10 in money not only the time impact on Mr. Geisen's
11 income, but in terms of the law firm, is anything
12 different since the jury verdict than it was before?

13 MR. HIBEY: Things are different. But
14 again in candor at the present time they are not
15 different with respect to this proceeding.

16 JUDGE FARRAR: Okay, thank you.

17 All right, then let's do this. The
18 parties have both indicated that it would likely --
19 well, it should at least be explored whether or not it
20 would be worthwhile will remain to be seen, but it has
21 the potential to be worthwhile. So they should sit
22 down and try to work out I guess rather than give you
23 a narrow charge, work out a game plan for how we could
24 move forward under the proper practical application of
25 collateral estoppel to this case.

1 If you can go further and arrive at a
2 stipulation of facts, that would be great. But you
3 all have heard this discussion. You I think come to
4 the same conclusion we have that this is not as simple
5 a case to define as the papers may have indicated. It
6 will be a complicated process to make it a simple
7 trial. How much time Ms. Clark, Mr. Hibey, do you all
8 think you could use for those discussions? Are we
9 talking a couple of weeks?

10 MR. HIBEY: Well, Your Honor, could I add
11 one item to the agenda to be -- to be addressed
12 perhaps right now, and that might have an impact on
13 timing as well.

14 When the staff has indicated that they
15 might call a couple of witnesses, and that they have
16 to make pretrial disclosures, and that they would
17 project until the 5th, is that all on the issue of
18 safety? Because if it is, then I think we ought to
19 tee that up in a brief promptly, so that you call can
20 resolve that question.

21 JUDGE FARRAR: Ms. Clark?

22 MS. CLARK: Fundamentally what we see that
23 it is our burden to do is to establish how the past
24 sanction is justified by the factors set forth in the
25 enforcement policy. So at the very least we would

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1 have a member from our enforcement staff who would
2 testify as to the manner in which the staff applied
3 those factors to the violations identified in the
4 order.

5 And one of those factors is safety
6 significance. So that is an issue that was considered
7 by the staff, and was one of the factors that the
8 staff is actually required to account for in assessing
9 enforcement sanctions.

10 JUDGE FARRAR: Okay, that would be one
11 witness. You said one or two.

12 MS. CLARK: Correct, and we may have more
13 than one individual from the enforcement staff, and
14 it's possible we may have a technical staff member to
15 discuss any questions about safety significance.
16 Although we haven't decided for certain who our
17 witnesses will be yet.

18 JUDGE HAWKENS: If you are not able to
19 agree on all the factual matters, Ms. Clark, would you
20 foresee yourself possibly wanting to depose Mr.
21 Geisen?

22 MS. CLARK: Yes, that is certainly a
23 possibility.

24 JUDGE FARRAR: Mr. Hibey, does that answer
25 your questions?

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1 MR. HIBEY: Yes, and because it does I
2 would ask the Court to set a schedule for us to move -
3 - well, I'm getting a conflicting signal here.

4 If you would indulge me one moment so we
5 could be on the same page of the hymn book at least in
6 this office.

7 JUDGE FARRAR: Certainly, go ahead.

8 MR. HIBEY: I'll do it right now.

9 (Whereupon at 10:52 a.m. the proceeding
10 in the above entitled matter was
11 record at 10:53 a.m.)

12 JUDGE FARRAR: We're ready.

13 MR. HIBEY: May I suggest that staff and we
14 meet next week perhaps the 29th of July. We are just
15 checking, 30th of July, to discuss all the aspects of
16 the proceeding to be conducted.

17 JUDGE FARRAR: All right. Right, then,
18 let's have no limits on it. You all have heard the
19 problems we have -- or not the problems, you know, the
20 questions we have asked. So go ahead and see how you
21 can help us. WE are here at your disposal to try
22 whatever case both sides think needs trying.

23 My only thought might be, and we will want
24 to talk to Judge Trikouros offline about this, but I
25 don't think we need a whole big hearing on the safety

1 significance of this, if I can state our rough opinion
2 even -- I mean reactors are built so there are back-up
3 safety systems. And a misstatement can be very
4 serious in terms of the system, the regulatory system,
5 but there -- but it may not have great consequences if
6 the backup systems work.

7 So I don't know that we need a whole lot
8 of education on that, so I would hope you wouldn't
9 plan several days of hearing on that. We may want to
10 hear briefly on it; we need to know the role of what
11 happened, in course, what role Chairman Diaz' letter
12 played. But I would urge you not to focus too
13 extensively on that given the other issues in the
14 case.

15 JUDGE HAWKENS: This is Judge Hawkens. May
16 I suggest also during your discussions as you strive
17 to reach agreement on stipulations, if you are able to
18 come to agreement on a path forward, and come up with
19 timeframes, that you can propose to us, we -- that
20 would be helpful to us when we talk again to you on
21 the telephone.

22 MR. HIBEY: Yes, Your Honor.

23 JUDGE HAWKENS: Ms. Clark, one question for
24 you as well. Now that you are aware of what has
25 happened in the criminal proceeding, taking into

1 account Mr. Geisen's service in the nuclear industry,
2 his service to his nation, is there any willingness by
3 the staff when it meets with Mr. Hibey to discuss the
4 possibility of revisiting the five-year sanction? Is
5 that something that you would consider putting on the
6 table during next week's discussion?

7 MS. CLARK: I would need to check with my
8 staff before I can answer that question, but it is
9 something I will ask them.

10 JUDGE HAWKENS: Thank you. That is your
11 decision. But if it's something that the staff feels
12 is appropriate to do, it may not be a bad idea.

13 JUDGE FARRAR: Ms. Clark, does the July
14 30th date work for you?

15 MS. CLARK: On that subject --

16 JUDGE FARRAR: Well, we don't have to worry
17 about that. MS. CLARK: I'll talk to Mr.
18 Hibey about that.

19 JUDGE FARRAR: And then just send us an
20 email saying that you have agreed on a certain date.
21 And then -- I mean are we talking about a two-week
22 process here, Mr. Hibey?

23 MR. HIBEY: Well, I think that we'll know
24 very quickly when we sit down just how long or short
25 that process is going to be.

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1 JUDGE FARRAR: Okay, why don't we make it
2 simple? You all keep us posted by email that you had
3 a meeting, and you don't like each other's positions,
4 and you're not going to have another meeting; or yes,
5 you made some progress and you need another week.

6 Just keep us posted every time you meet,
7 and then at some point file a joint formal statement
8 saying here is what you have agreed on, here's what
9 you've not agreed on, and you would like us to call a
10 conference call on you know, give us a couple of dates
11 and we will get back together with you.

12 MR. HIBEY: Yes, Your Honor.

13 JUDGE FARRAR: Ms. Clark, that is all right
14 with you?

15 MS. CLARK: Yes, Your Honor.

16 JUDGE FARRAR: Please take up, when you do
17 have the meeting, this question of whether the board -
18 - whether it's relevant or not, whether the board
19 could get -- could save some time later by reading the
20 criminal transcript now, if you don't want us to do
21 that at this point, then we'll abide your wishes. But
22 if both sides agree it could save some later time by
23 reading it without determining whether it's relevant.

24 I know Judge Hawkens has to go somewhere,
25 and Judge Trikouros. The only last question would be

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1 point B, are questions there about, is there any
2 difference between the staff ban and the court ban,
3 and what exactly does that mean in terms of what roles
4 he can play, whatever extra supervision or escorts he
5 needs. Maybe that is something you call can talk
6 about. Because we need to know that, and the fact
7 that because of his felony conviction this may be more
8 important, because of his felony conviction, are there
9 other jobs? You probably can't get a job as a bank
10 examiner if you have a felony conviction for not
11 telling the truth to the government.

12 So let's -- unless someone has a ready
13 answer to all that, let's defer that to a later time;
14 we don't need to know that now.

15 Does anyone have anything they need to
16 offer on that right now?

17 MR. HIBEY: No, we can be more fulsome in
18 that regard on another occasion.

19 JUDGE FARRAR: Okay, Ms. Clark, do you
20 agree with that?

21 MS. CLARK: Yes, I do.

22 JUDGE FARRAR: All right, then we can end
23 this now. Given my bad reputation for prehearing
24 conferences, I see we are only a minute late, so let
25 the record reflect that, or 91 minutes. We will leave

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1 it to the parties to agree on a date to confer, and
2 they will keep us posted, so we will probably not put
3 out any kind of order following this other than trying
4 to recount what happened here, other than just a brief
5 order saying we sent you all to the drawing board to
6 come up with something.

7 Judge Trikouros, anything from you?

8 JUDGE TRIKOUROS: No, I've been intently
9 listening, and nothing at this time.

10 JUDGE FARRAR: Okay, thank you, and we can
11 talk this afternoon.

12 Mr. Hibey, Ms. Clark, anything else?

13 MR. HIBEY: No, Your Honor, thank you.

14 MS. CLARK: No, Your Honor.

15 JUDGE FARRAR: And I again want to thank
16 you. It's a pleasure to be involved with real
17 professionals who get right to the point and don't
18 posture and take positions that make sense, whether or
19 not they will be the extreme positions that their
20 clients might want them to take.

21 And so we really look forward to working
22 with you on this case.

23 Thank you all at this point, and we will
24 recess this conference.

25 Thank you.

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(Whereupon at 11:02 a.m. the proceeding
in the above-entitled matter was
adjourned)

CERTIFICATE

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

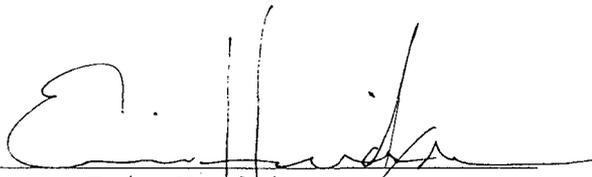
Name of Proceeding: Pre-hearing Conference

Docket Number: IA-050-052

ASLBP No. 06-845-01-EA

Location: (phone conference)

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.



Eric Hendrixson
Official Reporter
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