

RAS C-15

## Official Transcript of Proceedings

# NUCLEAR REGULATORY COMMISSION

Title: Pre- Hearing Conference ITMO David Geisen

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

Location: (telephone conference)

Date: Thursday, October 23, 2008

Work Order No.: NRC-2508

Pages 682-734

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

PRE-HEARING CONFERENCE

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IN THE MATTER OF: : Docket No. IA-050-052

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

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Thursday,

October 23, 2008

The above-entitled matter came on for  
hearing, pursuant to notice, at 3:30 p.m.

BEFORE:

MICHAEL C. FARRAR Administrative Judge

E. ROY HAWKENS Administrative Judge

NICHOLAS G. TRIKOUROS Administrative Judge

1     APPEARANCES:

2             On Behalf of the Nuclear Regulatory Commission:

3                     LISA B. CLARK, ESQ.

4                     CATHERINE MARCO, ESQ.

5                     SHAHRAN GHASDAMIAN, ESQ.

6                     KIMBERLY A. SEXTON, ESQ.

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11

12             On Behalf of David Geisen:

13                    RICHARD A. HIBEY, ESQ.

14                    ANDREW T. WISE, ESQ.

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

(3:30 p.m.)

JUDGE FARRAR: Let's go on the record.

We're here in the David Geisen proceeding.

This is Mike Farrar, Chairman of the Licensing Board at headquarters. With me here are my two colleagues, Roy Hawkens and Nick Trikouros, and our Law Clerk, Johanna Thibault. The Court Reporter, Toby, is here with us.

For Mr. Geisen, who do we have?

MR. HIBEY: Richard Hibey and Andrew Wise.

JUDGE FARRAR: Okay.

MR. HIBEY: Good afternoon.

JUDGE FARRAR: Thank you. Good to talk to you again.

Ms. Clark?

MS. CLARK: Yes. This is Lisa Clark for the Staff. Also here are Catherine Marco, Shahrn Ghasdamian, and Kimberly Sexton.

JUDGE FARRAR: All right. Glad to have you all with us. And Ms. Sexton?

MS. SEXTON: Thank you.

JUDGE FARRAR: Ms. Sexton, do you want to state your name for the Court Reporter?

MS. SEXTON: Oh. Lisa -- Ms. Clark

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1 already stated it. Kimberly Sexton --

2 JUDGE FARRAR: Oh, okay.

3 MS. SEXTON: -- for the Staff.

4 JUDGE FARRAR: Thank you. All right.

5 Good to have you here.

6 We called this -- or convened this call,  
7 because in the latest of a series of status reports  
8 since our last pre-hearing conference on July 21st we  
9 were informed that it turns out that an overall  
10 settlement is not possible, that the parties are  
11 working on a possible statement of the issues for  
12 stipulation, and that Mr. Geisen would like to see the  
13 hearing completed by the end of the calendar year.

14 As we discuss those matters, the Board  
15 would very much be in favor of an early resolution of  
16 this, because after the first of the year our workload  
17 could increase quite dramatically, and the sooner we  
18 do this the better. So if you all would bear that in  
19 mind.

20 Let me ask a couple of questions. Ms.  
21 Clark, the stipulation that you sent to Mr. Hibey, how  
22 many -- just to have an idea what we're talking about,  
23 how many pages is that?

24 MS. CLARK: Well, I believe the total  
25 filing was approximately 11 pages. And to give you an

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1 idea of the scope of this stipulation, what I was  
2 attempting to do is craft stipulations that would  
3 resolve issues of the inaccuracies and matters in  
4 which the submissions were incomplete, with the idea  
5 that if we come to a satisfactory conclusion on those  
6 stipulations we would not have to present expert  
7 testimony during the hearing.

8 JUDGE FARRAR: Okay. Mr. Hibey, have you  
9 had a chance to look at that at all?

10 MR. HIBEY: We have, Your Honor. Mr. Wise  
11 has looked at it more closely than I have. So I think  
12 perhaps he could comment on it.

13 JUDGE FARRAR: All right. And, Mr. Wise,  
14 I don't need a -- you know, a -- obviously, I don't  
15 need a final decision, but does it look promising?  
16 Or, you know, give us a characterization of it if you  
17 can.

18 MR. WISE: Judge, I think we are very,  
19 very close. Ms. Clark and I have been talking a lot.  
20 We talked about it again this morning. And, you know,  
21 my best guess is that in the next couple of days we  
22 will have another conversation, and the end result is  
23 that I think that the document that emerges from the  
24 process will look very close to what it is now.

25 There are a couple of individual semi-

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1       conclusory statements that I think we need to hammer  
2       out and figure out the exact language.  But in the  
3       main, I think we are going to stipulate to just about  
4       everything in that document, and probably a good deal  
5       more.

6               I think when this gets before the Board  
7       there is going to be an agreement between the parties  
8       to a great majority of the facts.  This is not going  
9       to be a situation where we are, on behalf of Mr.  
10       Geisen, denying that he is the one who said certain  
11       things on telephone calls, for example, or wrote  
12       certain things in some of the later submissions.

13              I think the question for the Board is  
14       really going to be what he knew when he signed off on  
15       early documents or made certain statements.  But there  
16       won't be a question about whether he was the one that  
17       spoke the words or whether he was the one that wrote  
18       captions, for example.

19              So I think we're going to be able to  
20       stipulate to a large amount of that, and then another  
21       group of facts that go more to the issue of knowledge.  
22       But as I told Ms. Clark, we do not expect to be  
23       arguing that the submissions were not inaccurate or  
24       challenging the evidence to the extent that Staff  
25       would have to call experts to prove up those elements

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1 of their case.

2 JUDGE FARRAR: Okay. Because that's  
3 certainly welcome news, because every time at least I  
4 thought of how -- how we would get involved in the  
5 collateral estoppel doctrine, anything short of  
6 stipulation struck us as, you know, leading perhaps to  
7 an endless hearing where every question gets  
8 challenged on the grounds that it's -- you know, the  
9 answer would be collateral estopped, and so forth. So  
10 I would encourage you to -- to keep going with that.

11 The next question is going to be: how  
12 much longer do you need to do that? But let's hold  
13 that for a minute, because if it's as promising as you  
14 say we wouldn't want to hurry you, if it's going to  
15 save us a lot of time.

16 If -- going to our question 2 in the  
17 little order convening this call, if you reach that  
18 stipulation, what are we talking, a one- or two-day  
19 hearing?

20 MR. WISE: This is Andy Wise again. You  
21 know, I think being conservative we would say that the  
22 hearing could take four days, but it could be shorter  
23 than that. I expect that our case will primarily  
24 consist of fairly directed cross examinations of  
25 whichever witnesses the Staff chooses to call, and I

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1 expect that the Staff will cross examine Mr. Geisen,  
2 who I think we will call.

3 I can't imagine us putting on much more  
4 than that. But I do think that we could -- my guess  
5 is we should be able to cover the witness testimony  
6 within a couple of days, and I think that there will  
7 be periods of arguments. And, frankly, it may be  
8 better cast as discussion between the Board and  
9 counsel about the significance of certain pieces of  
10 testimony, about how the Board ought to weigh the  
11 testimony they hear.

12 JUDGE FARRAR: All right. Thank you, Mr.  
13 Wise.

14 Ms. Clark, is that how -- what do you  
15 think about the length of the hearing and the approach  
16 Mr. Wise just told us about?

17 MS. CLARK: I would expect that maybe four  
18 days of hearing would probably be sufficient. I am  
19 not certain yet exactly how many witnesses we will  
20 have. I would say at the outside we would perhaps  
21 have five or six at very most, but very likely fewer  
22 than that.

23 JUDGE FARRAR: Well, last time we were  
24 here you told me one or two, didn't you?

25 MS. CLARK: Well, I think -- I think I was

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1 talking about the context of if we only talked about  
2 sanctions.

3 JUDGE FARRAR: Oh, okay. Right. Okay.

4 MS. CLARK: So I'm expecting probably two  
5 witnesses on the sanction issue, and then it's just a  
6 matter of how many witnesses we'll need to talk about  
7 disputed issues concerning the violations.

8 JUDGE FARRAR: All right. Now, under the  
9 approach both of you outlined we'd proceed under the  
10 stipulation, and that would kind of I guess frame the  
11 hearing. So would that sort of moot out the  
12 collateral estoppel problem?

13 MS. CLARK: I don't expect so. I believe  
14 that we are likely to reach satisfactory stipulations  
15 on the question of whether the submissions were  
16 inaccurate or incomplete. However, I don't think  
17 we'll reach, certainly not complete agreement, as to  
18 whether Mr. Geisen had knowledge that the information  
19 he was submitting was incorrect. So I think that we  
20 still would be seeking collateral estoppel as to those  
21 issues.

22 JUDGE FARRAR: Mr. Wise, does that comport  
23 with your thinking?

24 MR. WISE: I think it may be a little bit  
25 more diplomatic than I would say, Judge. I don't

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1 think we -- I don't think we're going to reach an  
2 agreement on collateral estoppel at all, I mean, on  
3 the knowledge issues.

4 Our view is -- on this is that on the  
5 issue of whether Mr. Geisen made his statements with  
6 knowledge and satisfied the standard for deliberate  
7 misconduct, that the prior verdict, because of the  
8 instructions they were given and the way that jury was  
9 allowed to reach its verdict, just cannot be  
10 translated into this proceeding in a collateral  
11 estoppel fashion.

12 So if the Staff is going to seek to, you  
13 know, preclude testimony from Mr. Geisen or argument  
14 from counsel about whether or not he made the  
15 statements that -- with knowledge and intent, I think  
16 -- I doubt that we are going to reach an agreement on  
17 that. And we're going to be seeking to put that issue  
18 in front of the Board.

19 JUDGE FARRAR: For our information, I  
20 assume the jury, unlike a complex tort case or  
21 something, was not given any special findings to make.  
22 They just came in with a general verdict of guilty or  
23 not guilty?

24 MR. WISE: That is correct.

25 JUDGE FARRAR: Okay. So we get no help.

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1 So we can't point to anything the jury did that is  
2 specific enough to help us, that on its face is  
3 specific enough to help us.

4 MR. WISE: That is correct.

5 JUDGE FARRAR: Okay. Assuming we went  
6 this way -- I won't ask you how long the hearing will  
7 be if we don't reach a stipulation, because I think  
8 we're going to reach a stipulation. Let's hold that.

9 Going down to the next question, do we  
10 need any discovery, or does everybody, after seven  
11 years, know everything there is to know about this  
12 case?

13 MS. CLARK: Your Honor, actually, we do  
14 have outstanding discovery, and I have -- I have -- we  
15 have outstanding interrogatories, and actually  
16 requests for admissions, and -- that were not answered  
17 at the time, because Mr. Geisen invoked his Fifth  
18 Amendment right. So we are seeking to have those  
19 interrogatories responded to now.

20 JUDGE FARRAR: Is that something you all  
21 can work out yourselves, or do you need us to be  
22 involved?

23 MR. WISE: Judge, I think we're going to  
24 be able to work this out. Ms. Clark and I spoke about  
25 this this morning, after talking about it during the

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1 past week. And I think the solution is going to  
2 involve a response from us that answers the questions  
3 that are relevant to the order and probably not in  
4 exactly the form that the interrogatories have been  
5 propounded.

6 And what we have in front of us is from  
7 the stage in the proceeding that was in advance of the  
8 trial, as Ms. Clark had said, and involves 60-some  
9 pages and about 512 subparts to the interrogatories.  
10 Mr. Geisen has now testified under oath twice, once in  
11 front of the OI and once at the trial, about 350 pages  
12 worth of testimony.

13 Out of that sworn testimony, I'm sure that  
14 I will be able to craft responses to the heart of what  
15 the interrogatories sought to discover, so that the  
16 Staff will know exactly what Mr. Geisen's position is  
17 on the relevant questions.

18 I've told Ms. Clark that I would do  
19 everything I could to get that to her by the end of  
20 this month, so in a week and a day. And my  
21 expectation is that once I do that there may be some  
22 questions around the periphery that the staff may  
23 still want to have answered, and we will endeavor to  
24 do that. And certainly if they want to depose him, we  
25 will make him available for that.

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1                   So I think we're going to be able to get  
2 to a point where the Staff is satisfied with what they  
3 have received, hopefully without us having to answer  
4 every one of the interrogatories in the form they are  
5 now propounded.

6                   JUDGE FARRAR: Ms. Clark, what I hear Mr.  
7 Wise saying is he is going to respond to the spirit of  
8 your prior discovery requests. Assuming he does that  
9 in, you know, good faith and full measure, is that --  
10 is that approach likely to be satisfactory to you?

11                   MS. CLARK: I think we -- he understands  
12 what we're looking for. And, again, we'll see -- you  
13 know, we'll I guess talk tomorrow after he responds,  
14 and at that time we'll see whatever -- whatever  
15 outstanding questions there may be.

16                   JUDGE FARRAR: Okay. If we were to  
17 proceed on the course that you all have just outlined,  
18 when could we get to a hearing?

19                   MR. WISE: We'd like to get to the hearing  
20 on the 8th of December, and wrap it up on the 12th.

21                   JUDGE FARRAR: Eighth through the 12th of  
22 December?

23                   MR. WISE: Yes, Your Honor.

24                   JUDGE FARRAR: Hold on a second here.  
25 We'll go off the record for a moment.

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1 (Whereupon, the proceedings in the  
2 foregoing matter went off the record at  
3 3:45 p.m. and went back on the record at  
4 3:46 p.m.)

5 JUDGE FARRAR: Back on the record.

6 We just wanted to check that date among  
7 the Board members. Ms. Clark, does that date make  
8 sense to you?

9 MS. CLARK: No, Your Honor. It does not.  
10 That's the first I've heard of that date. When I look  
11 at trying to project out a potential schedule --

12 MR. WISE: Excuse me. We have -- that  
13 date was proposed by -- you and I talked about -- I  
14 told you --

15 MS. CLARK: December 8th?

16 MR. WISE: I told you earlier on the call  
17 today that that was -- were going to be looking -- we  
18 were going to be asking for on this call.

19 JUDGE FARRAR: Well, that's --

20 MS. CLARK: In any event --

21 JUDGE FARRAR: That's all right. Just,  
22 Ms. Clark, what do you think of it?

23 MS. CLARK: I don't think -- I don't think  
24 it's feasible. Even if we get complete discovery --  
25 and, of course, first of all, if we -- if we don't get

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1 complete discovery, then that would of course mean  
2 that we would be into November looking to get our  
3 written responses, and potentially our stipulations.  
4 But even assuming that there are no outstanding issues  
5 whatsoever, and we consider the initial discovery  
6 responses complete, we still have to go forward with  
7 depositions.

8 JUDGE FARRAR: Well, let's hold up here.  
9 Under the rules, Mr. Geisen is entitled to an  
10 expedited hearing. Now, he hasn't gotten an expedited  
11 hearing up to this point, and let's not talk about the  
12 past. But suppose we started right now, suppose this  
13 was a brand-new case and he's -- was entitled -- you  
14 know, and we're trying to give him an expedited  
15 hearing.

16 The word "expedited hearing" says to me  
17 that means something other than the ordinary  
18 procedures you follow. And the United States  
19 Government has been dealing with this case for seven  
20 years, they have had all kinds of investigations, and  
21 why do we need more discovery, other than what has  
22 already been outlined so far?

23 MS. CLARK: Let me go back and repeat  
24 that. We still have an outstanding discovery request.  
25 Now, Mr. Geisen of course had the option of responding

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1 or objecting to those requests, but we are entitled to  
2 get full and complete responses.

3 JUDGE FARRAR: Well, no. They've --  
4 they've said I think that they are going to give you  
5 full and complete responses to the spirit of the  
6 questions. But sometimes when we have an expedited  
7 hearing you don't get the things that you ordinarily  
8 would get if we have to move quickly. In other words,  
9 we're not going to be -- and I may or may not be  
10 speaking for all of my colleagues, but we are not  
11 going to be on a normal schedule here.

12 This has gone on long enough. We are at  
13 a point -- I commend all of you for the work you have  
14 done trying to settle this, for the very reasonable  
15 approach. I think I complimented both sides last time  
16 for taking very succinct and very reasonable  
17 positions. But we're going to -- we're going to move  
18 this forward, unless somebody can show prejudice from  
19 moving too fast and the need for extraordinary -- or  
20 the normal amount of regular discovery at this stage  
21 of a seven-year proceeding is something I would want  
22 to hear some justification for.

23 JUDGE HAWKENS: Ms. Clark, this is Judge  
24 Hawkens. Let me ask you this question, and Mr. Hibey  
25 and Mr. Wise can weigh in after I hear your response.

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1 But they have the pending discovery request in front  
2 of them. It sounds like they want to respond to the  
3 spirit, which in some cases they may take the liberty  
4 of reframing the question, similar to Governor Palin  
5 in the debates, providing the answer to the question  
6 they wish.

7 But given the fact that we want to proceed  
8 expeditiously, and given their understanding, if they  
9 don't respond to the precise question that you posed  
10 to them, can't we just say the burden is on them to do  
11 that? If they don't do it, then we may draw an  
12 adverse inference from their failure to do so. And  
13 that way we can proceed quickly with the discovery and  
14 try to shoot for that target date of December 8th.

15 MS. CLARK: Well, in my discussions with  
16 Mr. Wise, we recognized that especially if we reach  
17 stipulations on a large number of issues that may --  
18 it may be appropriate for them not to answer some of  
19 the outstanding discovery requests that relate to the  
20 specific matters in the stipulation.

21 Furthermore, you know, I believe that the  
22 point is that he must again respond to the spirit of  
23 our contentions -- our interrogatories, which of  
24 course are seeking to understand his claims and  
25 defenses. To the extent that he does in fact answer

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1 those questions, then we won't need to do anything  
2 further. But I think that it's commonplace in  
3 discovery for parties to not necessarily be satisfied  
4 with the first round of answers.

5 I'm not saying that's necessarily going to  
6 be the case, but we must realize that there might be  
7 circumstances in this situation where discovery may  
8 have to be -- the written discovery period may have to  
9 extend beyond October 31st. I'm not saying it's  
10 absolute, but it is a possibility.

11 And even if we were to be completely  
12 satisfied with the written discovery that we receive  
13 by October 31st, we still need to go forward and  
14 conduct depositions. And --

15 JUDGE FARRAR: Tell me why you need  
16 depositions. Your people have talked to him. I think  
17 they interviewed him four times, and he has testified  
18 publicly twice.

19 MS. CLARK: Your Honor, I have not  
20 questioned him. Our OI agents have questioned him,  
21 and that's an entirely different matter than having  
22 counsel question him. And, frankly, we have some  
23 testimony on the record, but the scope of the criminal  
24 trial is entirely different than the scope of the  
25 subjects of our order. He has not been questioned by

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1 us, counsel for the Staff, on the matters that are  
2 encompassed by our enforcement order, and that is what  
3 we would seek to do.

4 JUDGE FARRAR: Let me just ahead, without  
5 indicating that this is -- what we're talking about  
6 now has in any way been resolved, let me jump ahead.  
7 Do you all envision that the testimony of these people  
8 would be live, or that it would be prefiled written  
9 testimony?

10 MR. WISE: I think given the nature of the  
11 question that the Board is going to have to decide.  
12 I think this is probably the rare case where you have  
13 to rely on live testimony. The few disputes that will  
14 remain after the factual stipulations and agreements  
15 I predict are going to turn on whether the Board finds  
16 particular witnesses to be credible. And I think in  
17 order to make that determination you really need to  
18 have them in front of you and you need to hear from  
19 them and you need to watch them, especially being  
20 cross examined.

21 JUDGE FARRAR: Ms. Clark, do you agree  
22 with that?

23 MS. CLARK: I do agree.

24 JUDGE FARRAR: Okay. So we won't have --  
25 we will have no prefiled written testimony. How does

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1 the Board, in advance of the hearing, and without  
2 asking you to file extensive pretrial briefs that lay  
3 out your whole case -- because that's a very time-  
4 consuming venture -- how does the Board get prepared?

5 We asked at the last conference about  
6 reading the transcript of the criminal case. What do  
7 we read so that the day we walk in there we are ready  
8 to take on the case rather than just, you know, being  
9 sponges absorbing mindlessly whatever is said to us?

10 MS. CLARK: Well, I would say that in this  
11 context the way that I wrote our stipulations is I  
12 wrote them in a narrative form. And I included  
13 background regarding the questions that the NRC Staff  
14 was asking of licensees through their bulletins. And  
15 I included the specific portions of the responses, so  
16 that to some extent that will give you a context of  
17 what the information was that was submitted and why it  
18 was inaccurate and incomplete.

19 JUDGE FARRAR: You still don't want us to  
20 read the transcript of the criminal case?

21 MS. CLARK: In fact, I think that our  
22 collateral estoppel motions may require you to be  
23 familiar with the criminal case, to some extent. So  
24 I think that would be useful as well.

25 JUDGE HAWKENS: Ms. Clark, Judge Hawkens

1 here again. You mentioned earlier that the additional  
2 discovery was necessary, because the scope of the  
3 criminal trial was entirely different from the scope  
4 of the order. Can you explain how you reconcile that  
5 statement with wanting to apply collateral estoppel  
6 and having us looking at the trial transcript?

7 MS. CLARK: Yes. Collateral estoppel  
8 would not apply to all of the points in our order.  
9 The way I see it it's collateral estoppel only applies  
10 to those portions of our order which were also charged  
11 in the criminal indictment. And that's a limited  
12 subject of the matters that he was charged with in our  
13 violations.

14 JUDGE FARRAR: Did I understand you, Ms.  
15 Clark, that you are going to at some point between now  
16 and whenever you are going to file collateral estoppel  
17 motions?

18 MS. CLARK: I beg your pardon?

19 JUDGE FARRAR: Did I indicate -- did I  
20 hear you correctly that at some future date you are  
21 going to file collateral estoppel motions?

22 MS. CLARK: Yes. In projecting how I  
23 thought the process would work, it seemed to me that  
24 after discovery -- and that would be after we complete  
25 our depositions -- what Mr. Wise and I had discussed

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1 is even though we can't -- we probably won't be able  
2 to stipulate as to conclusions as to Mr. Geisen's  
3 knowledge, we could probably stipulate to the factual  
4 exhibit evidence that we would want to put into  
5 evidence. That would expedite that process. That way  
6 we would have a mutual set of exhibits that we would  
7 agree would be admissible in the hearing.

8           Once we -- once we complete the process,  
9 then I was thinking that would be an appropriate time  
10 for me to file a collateral estoppel motion.

11           JUDGE FARRAR: All right. Now, that  
12 requires you to file it, us to give Mr. Geisen time to  
13 reply, and then us to rule. And then, when we rule  
14 and get into the hearing, no matter how we rule, there  
15 will be countless objections. I'm just hypothesizing  
16 here. There will be countless objections to every  
17 question, because it's on the wrong side of the  
18 collateral estoppel ruling.

19           What would be simpler -- and, you know, we  
20 recognize -- in fact, we may have been the ones who  
21 first raised it -- that there is a collateral estoppel  
22 principle, you know, at work here. It's easy to  
23 state. Its application gives me heartburn every time  
24 I think about it.

25           Why wouldn't we just go into trial, have

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1 a freewheeling -- if I can use that word -- a  
2 freewheeling trial, and your post-trial briefs argue  
3 as part of your case which question -- which portions  
4 of testimony can't be considered in reaching a  
5 decision, because they run afoul of the collateral  
6 estoppel rule. In other words, what I'm saying is,  
7 isn't it easier to apply that rule in a very difficult  
8 circumstance after the fact rather than before the  
9 fact? Mr. Hibey, why don't you try that one?

10 MR. HIBEY: I was sitting here analogizing  
11 to a non-jury trial where precisely those kinds of  
12 things happen, where the Judge takes in all of the  
13 evidence and reserves on objections until everything  
14 is in and then decides what evidence he will consider  
15 admissible and rule accordingly.

16 It seems to me that the approach you are  
17 outlining, Your Honor, fits with that analogy that I  
18 had in mind, and accomplishes a great deal in the  
19 process. So we would favor that approach.

20 JUDGE FARRAR: Ms. Clark?

21 MS. CLARK: I was impressed. I was seeing  
22 collateral estoppel as working somewhat differently I  
23 think, in that it would actually shorten the hearing  
24 and limit the issues that we would need to address.

25 The way I saw it is if we had a set of

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1 mutually agreed upon stipulations as to the matters in  
2 the submittals that were inaccurate or incomplete, and  
3 then we determined that -- through the operation of  
4 collateral estoppel certain of those elements he -- he  
5 would find basically that that would be a decision  
6 sort of like similar to a summary judgment decision,  
7 that for certain of those elements the fact that he  
8 deliberately submitted them with knowledge of their  
9 inaccuracy was established through collateral  
10 estoppel. And so those issues would not need to be  
11 even pursued in the hearing.

12 JUDGE FARRAR: Let me interrupt you there.  
13 If I understand you correctly, that -- so in effect  
14 you would have a stipulation, and then you would have  
15 some collateral estoppel rulings that would in effect  
16 add to the facts that are given. They wouldn't be  
17 stipulated, but they'd be given, because we'd find  
18 them in advance as a matter of collateral estoppel.  
19 Is that --

20 MS. CLARK: Exactly. And so those issues  
21 would not be even in the contested hearing at all.

22 JUDGE FARRAR: That makes -- that makes  
23 some sense. I mean, what I don't want to get into is  
24 agonizing rulings on every question about how it --  
25 you know, that the question will trigger an answer

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1 that's outside -- that's banned by collateral  
2 estoppel.

3 MS. CLARK: Your Honor, I just want to say  
4 that truly it is in the Staff's interest as well, and  
5 I have been trying to frame this hearing in such a way  
6 to expedite it as much as possible, and to make the  
7 hearing as simple and straightforward as we can. And  
8 that is really my purpose in coming up with this.

9 And while I -- I don't think the  
10 December 8th date is really feasible, I do think there  
11 are some procedural things that should happen before  
12 then, and that's why. But I don't think that we're  
13 going -- talking about having the hearing that much  
14 further beyond that date, perhaps January or February.

15 JUDGE FARRAR: That would be nice, but I  
16 come back to what I said at the outset, after the 1st  
17 or after Christmas there is going to be some enormous  
18 cases in here, and getting this done before the  
19 holidays rather than after is a goal to be desired.

20 From that point of view, it is also a goal  
21 to be desired. I don't want to be flip about this,  
22 but it would be nice to have Mr. Geisen's expedited  
23 hearing slightly less than, rather than more than,  
24 three years after the charge.

25 So suppose we looked at December 8th to

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1 12th, and asked you all -- you've heard what we think  
2 here. Starting -- whatever can be said about the last  
3 two and a half years, Mr. Geisen is entitled to an  
4 expedited hearing, which means -- which means the  
5 hearing is expedited, if you follow exactly the  
6 procedures that you would in an ordinary hearing, and  
7 take exactly as long as you would in an ordinary  
8 hearing.

9           So suppose we pick -- now, you know, this  
10 is the first we've ever heard of December 8th as well.  
11 But suppose we pick that date and left it to you all  
12 to come up with -- as part of your -- as part of your  
13 stipulation, part of what you're working on, you come  
14 up with a timeframe for when each event will be done.

15           And we -- and we don't mind backloading  
16 the case, rather than frontloading it, in terms of  
17 written filings. We've already said we're not going  
18 to have prefiled written testimony. If you give us  
19 something to read that already exists, we don't need  
20 -- we can get by without prehearing briefs.

21           What we might ask is maybe a three-pager  
22 from each of you a week ahead of time that says, you  
23 know, "Here is the outline of the case you are trying  
24 to establish." So that as we are sitting there  
25 hearing everybody we -- you know, we can put it in an

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1 outline. But, you know, not a 45-page brief with  
2 references to witnesses and to exhibits, just a two-  
3 or three-page outline, you know, "Here is your case  
4 that you are going to put on."

5 So that would be -- that would be the only  
6 frontloaded stuff. Then, we can backload it with  
7 anything you want to file after the hearing is over  
8 that would challenge evidence that we heard that you  
9 think we shouldn't have heard, or should give no  
10 credence to, or it's outside the scope, and, you know,  
11 renew any collateral estoppel arguments, and give us,  
12 you know, very good proposed findings of fact and  
13 conclusions of law.

14 And we don't -- and once we have the  
15 hearing over and get some backloaded documents, that  
16 would enable us to complete our work. If we frontload  
17 it with documents like we usually do, we won't get to  
18 hearing, as you say, Ms. Clark, until January or  
19 February, and that's -- that's too late on a number of  
20 grounds.

21 Somebody started to interrupt there for a  
22 second. Go ahead, whoever it was.

23 MR. HIBEY: We were just going to indicate  
24 our acceptance of that scenario. We think that's  
25 really the way to go here.

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1 JUDGE FARRAR: Ms. Clark, can you -- can  
2 you -- I'd ask you whether you like that approach or  
3 not. But how about a different question, can you live  
4 with that approach?

5 MS. CLARK: Your Honor, I'm afraid I  
6 cannot. I would have to strongly object to setting a  
7 date of December 8th. I don't see that there is any  
8 possible way that we can satisfactorily accomplish  
9 what we need to do to prepare our case, which is to  
10 obtain the necessary discovery that we need, to file  
11 our prehearing motions, including collateral estoppel,  
12 to ensure that discovery is complete to our  
13 satisfaction. And I think this is highly prejudicial  
14 to the Staff.

15 JUDGE FARRAR: Okay. Let's focus on just  
16 one thing you said there -- discovery complete to your  
17 satisfaction. I can't say strongly enough that this  
18 was supposed to be an expedited hearing.

19 Let's analogize to national security  
20 matters. When the government comes in and some --  
21 some defendant wants to get national security  
22 documents, the government says, "Well, you can't have  
23 them," and then the Judge says, "Well, that's right.  
24 The government is entitled to withhold those  
25 documents, but I'm entitled to dismiss the case."

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1 Mr. Geisen is entitled to an expedited  
2 hearing. That may mean that you don't get discovery  
3 completed to your satisfaction. Maybe you get only  
4 the discovery that can be done in an expedited  
5 hearing, and we are approaching the third year. And  
6 so whatever -- assume the Commission was entirely  
7 right on their decision, and, you know, we may have --  
8 some of us could disagree with that.

9 But assume they were entirely right, that  
10 the Justice Department's interests were paramount.  
11 That doesn't mean that there is -- Mr. Geisen is  
12 remediless or that that didn't deprive him of an  
13 expedited hearing. It did deprive him of an expedited  
14 hearing, and that's fine, the Commission said that's  
15 worth it, because the Department of Justice needs  
16 that.

17 But now the shoe is on the other foot, and  
18 he is entitled to an expedited hearing starting now.  
19 And the -- I don't think it's discovery complete to  
20 your satisfaction. It's discovery sufficient to let  
21 you do your job, given that the government has been on  
22 this case for seven years.

23 Now, that's a seat-of-the-pants feeling.  
24 Maybe it will prove to be wrong or not. Maybe we --  
25 but I would -- I really want to encourage the parties

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1 -- and I think I have the assent of my colleagues here  
2 -- that we would really like to get this to the  
3 December 8th to 12th date, and we -- you all have done  
4 a remarkable job working together.

5 We have been pleased with the  
6 professionalism, the cooperation, the succinctness,  
7 not taking extreme positions. And it seems to me if  
8 we were to charge you to set it up so that we -- that  
9 we can walk into a hearing December 8th and you are --  
10 both sides are reasonably prepared, and we have some  
11 idea of what's -- what we're going to be facing,  
12 whether that's from reading the old transcript or from  
13 a three-page outline of where you're going, so that we  
14 can do our jobs, that's the way to go.

15 Now, Mr. Hibey, I know you've indicated  
16 you agree with that. Ms. Clark, do you want to take  
17 a little recess and consult with your people and see  
18 what you think about that?

19 MS. CLARK: Okay. First, I would like to  
20 make a couple of points about the concern about an  
21 expedited hearing. Mr. Hibey was sentenced in May of  
22 this year.

23 MR. HIBEY: Mr. Hibey has not --

24 (Laughter.)

25 MS. CLARK: Sorry. Mr. Geisen.

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1 JUDGE FARRAR: Mr. Hibey should have been  
2 sentenced probably, but --

3 (Laughter.)

4 MR. HIBEY: Mr. Hibey feels as if he had  
5 been sentenced with the --

6 (Laughter.)

7 -- in this case.

8 MS. CLARK: If Mr. Hibey had wanted an  
9 expedited hearing, he could have come in here and  
10 asked for it in May.

11 JUDGE FARRAR: He did.

12 MS. CLARK: Not waited from May until now.

13 JUDGE FARRAR: No, no. He came in in June  
14 and said he wanted something in standard, and what he  
15 wanted was too simplistic -- it was too simple a  
16 dichotomy. You know, he said he only wanted to  
17 challenge the enforcement, not the underlying charges,  
18 but we found that that was an oversimplified approach.  
19 But he came in then, and you all have been talking  
20 ever since.

21 MS. CLARK: Yes. And he -- and the first  
22 time he said he needed a hearing by the end of  
23 December, that I heard was now. And it seems to me  
24 that if he really wanted a hearing expedited, and it  
25 was necessary to have it done by the end of the year,

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1 he could have given us notice before now.

2 Secondly, Mr. Geisen is now criminally  
3 sentenced. He is on probation. He is under a  
4 prohibition from working under his criminal sentence.  
5 I don't see, under the circumstances, how delaying  
6 this hearing for two months is prejudicial in any way  
7 to him.

8 MR. HIBEY: I'd like to respond to that.

9 JUDGE FARRAR: Go ahead.

10 MR. HIBEY: First of all, the Court, in  
11 sentencing Mr. Geisen, did impose a three-year ban on  
12 his employment in the nuclear industry. At the same  
13 time, the Court invited us to return to it once we had  
14 reached disposition with respect to the NRC  
15 proceeding, the debarment proceeding there, the  
16 scenario being that if we are successful in bringing  
17 about the -- what I'll call a favorable resolution of  
18 this particular matter pending before the Board that  
19 we could bring that information to the Court,  
20 requesting the Court to terminate immediately its ban.

21 JUDGE HAWKENS: May I -- this is Judge  
22 Hawkens, Mr. Hibey. A quick interruption. What --  
23 even if the Board were to rescind the remaining  
24 portion of the sanction, and you went back to the  
25 Court, or the probation officer went back to the Court

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1 and asked the Court to rescind that portion of the  
2 sentence, do you know what the effect of the fact that  
3 he is a convicted felon would have on his eligibility  
4 for work in the nuclear industry?

5 MR. HIBEY: I may be wrong on this -- and  
6 Mr. Wise will correct me -- it probably would still  
7 chill, if you will, the decision on the part of a  
8 prospective employer to employ him. And judging by  
9 the way in which companies in the regulated industry  
10 behave and react to the -- to the NRC, it is likely  
11 that he would have great difficulty in securing  
12 employment. However --

13 JUDGE HAWKENS: It's not an automatic bar,  
14 though, to your knowledge?

15 MR. HIBEY: To my knowledge, it isn't, but  
16 I can be contradicted on that. And I'm sure there are  
17 people here on this call who could do that. I do not  
18 believe it's an automatic bar. More importantly, what  
19 we would like to do is -- the scenario that we  
20 envision is relief from the debarment that is under  
21 consideration by this panel, relief from the debarment  
22 imposed by the sentencing Judge, reversal of his  
23 conviction, and thereby a clean slate for him to seek  
24 employment, something that I might add has perhaps  
25 reached a point of desperation, because the economy

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1 has not been kind to him and to the fledgling business  
2 that he has attempted to pursue, where he repairs  
3 gaskets in pizza ovens around Wisconsin and perhaps a  
4 couple of other states.

5 So there is a desire on our part to try  
6 and get him back to where he was before all of this  
7 was visited upon him. The scenario I pose is not out  
8 of the question. It has got probably more hope in it  
9 than anything else, but I still think it's realistic.  
10 And that's why we are excited to move forward, as we  
11 have been all along. I don't think anybody could ever  
12 suggest that we ever changed our mind about wanting to  
13 deal with this thing on an expedited basis.

14 That is why we are pressing now, so that  
15 we can pursue the courses that I have just laid out  
16 for you.

17 JUDGE HAWKENS: Mr. Wise, can you confirm  
18 that the felony convictions do not pose an automatic  
19 bar to employment in the nuclear industry?

20 MR. WISE: Judge, I don't have any  
21 different information from what Mr. Hibey just told  
22 the Court. I am no more certain, but I know of  
23 nothing that would suggest that it is a --

24 JUDGE HAWKENS: NRC Staff, do you have any  
25 additional intelligence on that question?

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1 MS. CLARK: Yes, we do. There is not an  
2 automatic bar. However, each licensee is required to  
3 conduct due diligence for all employees, establish  
4 that they are trustworthy and reliable, in order to  
5 afford them unescorted access to a nuclear facility.

6 So a licensee -- he will have to be  
7 processed through the licensee's program to ensure  
8 that everybody that has access to the facility can be  
9 trusted.

10 JUDGE HAWKENS: Thank you. Ms. Clark,  
11 another question for you. And I think we might have  
12 discussed this many months ago, and you might have  
13 given an answer then. But I apologize that I have  
14 forgotten it.

15 Let's -- your staff presumably will ask  
16 for collateral estoppel to be applied. Let's assume  
17 the Sixth Circuit reverses after -- after this Board  
18 has applied collateral estoppel. Wouldn't that have  
19 -- jeopardize the validity of this Board's decision,  
20 if the sentence and the proceedings on which we relied  
21 for that sentence were reversed by the Sixth Circuit?

22 MS. CLARK: Yes. They -- that would  
23 potentially be an issue, that Mr. Geisen could then  
24 revisit these issues, and collateral estoppel would no  
25 longer be effective.

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1 JUDGE HAWKENS: What impact does that have  
2 on your decision, then, to go forward and ask us to  
3 apply collateral estoppel?

4 MS. CLARK: We are confident, first of  
5 all, that the criminal conviction will be upheld in  
6 the Sixth Circuit. And so we don't see that this is  
7 a great risk. And in the interest of attempting to  
8 limit the issues that we need to address in this  
9 hearing, we believe that it's most effective to use  
10 collateral estoppel.

11 JUDGE HAWKENS: All right. Thank you.

12 JUDGE FARRAR: Ms. Clark, I think before  
13 we had our little series of questions I had asked if  
14 you wanted to consult with your colleagues about  
15 whether there is some way to get to this December 8th  
16 to 12th date. Do you want to take like a five-minute  
17 recess or something?

18 MS. CLARK: Okay, Your Honor.

19 JUDGE FARRAR: Yes. Hit your mute button  
20 and come back on when you want to.

21 (Whereupon, the proceedings in the  
22 foregoing matter went off the record at  
23 4:21 p.m. and went back on the record at  
24 4:24 p.m.)

25 JUDGE FARRAR: Go ahead, Ms. Clark.

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1 MS. CLARK: Oh, thanks. In discussing it  
2 here, I really -- we don't see any realistic way to  
3 accomplish the tasks that we need to do to be prepared  
4 for a hearing by December 8th. And, again, this  
5 doesn't account for any potential issues with  
6 scheduling, with depositions, and that sort of thing.

7 JUDGE FARRAR: Wait. Hold on. Let me  
8 interrupt. You keep talking about depositions. Maybe  
9 I didn't make myself clear. This is an expedited  
10 hearing in which the parties know everything about the  
11 case. Why couldn't we issue an order today saying  
12 there will be no depositions? That's what an  
13 expedited hearing means.

14 MS. CLARK: Well, Your Honor, we in fact  
15 do not know everything about the case. Because Mr.  
16 Geisen invoked his Fifth Amendment right, we have not  
17 been able to question him, and he has not responded to  
18 any of our written discovery requests. So, in fact,  
19 we have not had the opportunity to get all the  
20 information that we need about the case.

21 JUDGE FARRAR: Has he deposed the  
22 witnesses you are going to put on?

23 MS. CLARK: Has Mr. Geisen deposed -- has  
24 Mr. Hibey deposed our witnesses?

25 JUDGE FARRAR: Right.

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1 MS. CLARK: No. And I believe he said he  
2 intended to.

3 JUDGE FARRAR: Okay. Suppose nobody  
4 deposes anybody?

5 MS. CLARK: That would not be acceptable  
6 to us.

7 MR. WISE: Judge, this is Andy Wise. Can  
8 I interrupt for one second? Because I do think we  
9 have something to add to this. I strongly agree with  
10 I think what underlies the Court's sentiment, in so  
11 much as I think that this is a very different  
12 situation than what happens in most of these cases.  
13 There has been an entire trial. Mr. Geisen is on the  
14 record testifying for close to 400 pages.

15 That being said --

16 JUDGE FARRAR: Wait. Where did he -- do  
17 you mean -- did he testify in the criminal case?

18 MR. WISE: Yes. He was interviewed by OI  
19 for about 185 pages, and he testified in the criminal  
20 case, and that testimony is about 170.

21 JUDGE FARRAR: And he was cross examined  
22 -- he was cross examined by the Justice Department?

23 MR. WISE: He was. That being said --

24 MR. HIBEY: By the Justice Department,  
25 with questions being handed up to him by the NRC

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1 representative, who was in the well of the Court  
2 assisting the Court -- assisting the prosecutors.

3 MR. WISE: Judge, with that being said, I  
4 think that we understand the Staff's desire to take  
5 Mr. Geisen's deposition. I do think there are  
6 probably a couple of things, although I will say I  
7 think they are very small, that remain unanswered that  
8 the Staff has a right to put him on before a hearing.

9 We will make him available. There is no  
10 reason that that deposition should take us from  
11 December, which is a month and a half out, to February  
12 or January. We can arrange it at the Staff's  
13 convenience. We will bring Mr. Geisen here. We can  
14 do that deposition.

15 I think that -- you know, we have been  
16 talking about a lot of hypotheticals, and I think  
17 hypothetically this -- I would submit it seems much  
18 bigger than it is. Dave Geisen -- there is no mystery  
19 about what our position is in response to the Staff's  
20 order. Our position is, as articulated throughout the  
21 trial, that Dave did not know that the statements that  
22 were made by Davis-Besse were false when he signed off  
23 on them or when he made oral statements to the NRC.

24 The basis for that he has testified about  
25 at length. We will provide answers to the

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1 interrogatories. We will make him available for a  
2 deposition. But the suggestion somehow that there is  
3 a great unknown out there I just think is inaccurate,  
4 and I think it's unfair for, frankly, the reasons that  
5 have been articulated.

6 JUDGE HAWKENS: Mr. Wise, are you -- do  
7 you have an intention to depose Staff witnesses?

8 MR. WISE: Judge, I think if there are one  
9 or two witnesses that speak to the sanctions who we  
10 are not familiar with, there is a possibility that we  
11 would depose those folks. But I'm not sure we're  
12 committed to that, and certainly if it were those  
13 depositions that -- that forced us to forfeit a  
14 December hearing, we would forego those depositions.

15 MR. HIBEY: We'll just cross examine them  
16 cold.

17 JUDGE FARRAR: Like we did in the old days  
18 before 1938.

19 MR. HIBEY: Even more recent than that.

20 (Laughter.)

21 JUDGE HAWKENS: Ms. Clark, if Mr. Wise and  
22 Mr. Hibey were to make Mr. Geisen available for  
23 deposition at the Staff's convenience during the first  
24 week in November, what then would be the obstacle for  
25 targeting the December 8th hearing date?

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1 MS. CLARK: Well, I will receive their  
2 written discovery responses on the 31st. If there is  
3 any additional work that we need to do to resolve  
4 written discovery, that would give us no opportunity  
5 to do that before the depositions.

6 Can I ask if -- if there is any  
7 possibility of shifting this into the beginning of  
8 January?

9 JUDGE FARRAR: None. I'm sure you all are  
10 aware of proceedings that are coming down the pike.

11 Hold on a second. Let's go off the record  
12 for a moment.

13 (Whereupon, the proceedings in the  
14 foregoing matter went off the record at  
15 4:30 p.m. and went back on the record at  
16 4:33 p.m.)

17 JUDGE FARRAR: We're back on the record.

18 Mr. Wise, what's the chance you can speed  
19 up that October 31st delivery date for the  
20 interrogatories, or the pending discovery? And,  
21 again, accepting for now your notion that you don't  
22 have to respond to them exactly as worded, but as --  
23 in a way that makes sense and satisfies the spirit of  
24 the inquiries.

25 MR. WISE: I can probably get it to Ms.

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1 Clark by the middle of the week, which is the 29th.

2 MR. HIBEY: Well, what did you offer to  
3 begin with? October 31st, but he wants it earlier  
4 than that, so you are offering what?

5 MR. WISE: I could probably get it to  
6 Staff by --

7 MR. HIBEY: The 27th?

8 MR. WISE: Well, I could probably do it by  
9 the 28th or 29th.

10 JUDGE FARRAR: Suppose we pick the 29th.

11 MR. WISE: And I'll shoot for the 28th.

12 JUDGE FARRAR: Okay. Ms. Clark, then that  
13 gives -- that lets you get them a little bit early.  
14 And when would you like to take Mr. Geisen's  
15 deposition?

16 MS. CLARK: I think the week maybe --  
17 maybe the week of the 10th to the 14th. But I don't  
18 know, are you -- do you know if his availability --

19 JUDGE HAWKENS: Sounds like they are going  
20 to -- if we shoot for this December 8th hearing date  
21 -- and that's what the Board is shooting for -- I  
22 think Mr. Wise and Mr. Hibey will make him available  
23 at your convenience, Ms. Clark.

24 MS. CLARK: I'm thinking that would give  
25 us -- if we get them the 28th or the 29th, that would

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1 give us enough time to hopefully come to agreement on  
2 the joint stipulations and come to agreement on  
3 discovery responses the first week of November, and  
4 then the following week we could do depositions.

5 MR. WISE: Works with us.

6 JUDGE FARRAR: All right. So, and I  
7 think, Mr. Wise, you had said at the very beginning of  
8 this call that you were feeling reasonably good about  
9 the stipulations, maybe not entirely so, but that  
10 didn't seem to be a huge stumbling block.

11 MR. WISE: I think Ms. Clark and I can  
12 resolve that issue by the end of the day tomorrow.

13 JUDGE FARRAR: Okay. Okay. So, Ms.  
14 Clark, that would give you a week and a half, given  
15 you'd have a stipulation in hand, and you'd have the  
16 discovery responses, so that would give you a week and  
17 a half to prepare for the deposition.

18 MS. CLARK: Correct.

19 JUDGE FARRAR: Okay. So we do the  
20 deposition the week of the -- now, is there a Fifth  
21 Amendment issue with the deposition, Mr. Hibey?

22 MR. HIBEY: No, Your Honor.

23 JUDGE FARRAR: Okay. So we could have the  
24 deposition the week of the 10th. We are not asking  
25 for any prefiled written testimony, so you don't have

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1 to do that. We're not asking for any motions in  
2 advance. If you want to -- somebody wants to frame a  
3 short motion on collateral -- in other words, you  
4 don't have to convince us that the doctrine of  
5 collateral estoppel exists and fits this case.

6 Of course, the whole question is in its  
7 application, but don't waste a lot of time convincing  
8 us there is such a doctrine that generally --  
9 generally could be applicable here. If you want to  
10 file something and put it on record, but our notion is  
11 -- and if, Ms. Clark, you think you can try to get us  
12 to establish some additional facts through collateral  
13 estoppel, that's fine.

14 But if we have to leave the application of  
15 it open, as Mr. Hibey said, reserve it until the end  
16 of the case, we can -- we are not a jury. We can --  
17 we can hear evidence and then -- you know, and then  
18 decide to disregard it and then proceed from there.

19 That would give you, after the deposition,  
20 three weeks to in essence prepare for the trial in --  
21 and all you would owe us would be -- each of you would  
22 owe us a three-page outline of where your case is  
23 going, which we could have as late as -- I don't want  
24 you all working over Thanksgiving, but we could have  
25 it as late as December 2nd or 3rd. I mean, it's going

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1 to be short. We just need it to guide us. But we  
2 would -- did we hear agreement that we would have the  
3 -- that you want -- that it's okay for us to read the  
4 criminal transcripts?

5 MS. CLARK: Fine with the Staff.

6 JUDGE FARRAR: Mr. Hibey?

7 MR. HIBEY: Well, it's all right with us,  
8 Your Honor.

9 JUDGE FARRAR: Who is going to get us  
10 those?

11 MR. HIBEY: We can get them to you.

12 JUDGE FARRAR: Okay. Electronically or --  
13 yes, can you get them to us electronically?

14 MR. HIBEY: I believe that -- I think we  
15 can.

16 JUDGE FARRAR: Okay. That's simple. Get  
17 to us, then, as soon as -- if there's no objection,  
18 get them to us. It doesn't have to be tomorrow, but  
19 the -- you know, at the earliest point that you have  
20 somebody who can do it for us.

21 MR. HIBEY: Yes, we can get that done.

22 JUDGE FARRAR: And we'll read them and  
23 start getting prepared. Or if you all -- Judge  
24 Hawken has a suggestion that if there is any other  
25 material that both sides agree we -- it would help us

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1 to look at, then send us those. One of you say that  
2 you've agreed on it and send it to us electronically,  
3 or tell us where we can get it.

4 JUDGE TRIKOUROS: Exhibits from the trial?

5 JUDGE FARRAR: Do we want any exhibits  
6 from the trial? Well, you all talk. I mean, you all  
7 talk about -- in your discussions. You know, this --  
8 and what we're looking for here is obviously not to  
9 have the answers, because the answers are going to  
10 come at our own trial, but to have enough background  
11 so that we are not asking a lot of catch-up questions  
12 at the trial where you have to go back and educate us  
13 about what this whole incident was about, and so  
14 forth, that we -- you know, that we walk into the  
15 trial and we know what's going on and we can ask  
16 reasonably intelligent questions as opposed to, "Gee,  
17 take us back to the beginning and give us an hour  
18 primer on what happened."

19 So that's what we're looking for, just to  
20 get --

21 MR. HIBEY: We'll cull the exhibits down  
22 to a -- to a useful group, and then we'll get --

23 JUDGE FARRAR: Okay. And then, we would  
24 go to trial starting December 8th. I assume everybody  
25 wants that trial here?

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1 MR. HIBEY: Yes, Your Honor.

2 JUDGE FARRAR: Okay. Then, we will -- let  
3 me ask, again, Mr. Hibey, Mr. Wise, can you live with  
4 this arrangement?

5 MR. HIBEY: We will live with the  
6 arrangement, Your Honor.

7 JUDGE FARRAR: Ms. Clark, can the Staff  
8 live with this arrangement?

9 MS. CLARK: We will do our best.

10 JUDGE FARRAR: I'll take that as a yes.  
11 And we ordinarily don't put pressure on people like  
12 this, but if you come back with -- even if you just  
13 start now, it's an expedited hearing, and we need --  
14 we need to expedite it.

15 Just kind of a side bar question, Mr.  
16 Hibey, what is the briefing schedule in the Sixth  
17 Circuit?

18 MR. HIBEY: We file our brief at the end  
19 of November, December 1 I think. They file their  
20 brief at the end of December. We reply mid-January.  
21 The Court will then set a hearing -- an argument date,  
22 most likely in the first quarter of the year, and I  
23 don't know what the statistics are on turning cases  
24 around and deciding them.

25 JUDGE FARRAR: Okay. Does the Sixth

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1 Circuit tend to hear argument in most cases?

2 MR. HIBEY: Yes. They will certainly hear  
3 argument on this one.

4 JUDGE FARRAR: Okay. All right. Why  
5 don't we -- would it help or hinder the process for us  
6 to set another prehearing -- date for a prehearing  
7 conference? Or just be on call?

8 MR. HIBEY: My suggestion is that we could  
9 all be on call. It may very well be that there might  
10 be questions about the materials that are going to be  
11 sent to you by the -- by us, meaning the transcripts  
12 and the exhibits that the parties agree might be given  
13 to help you understand the case further, and that you  
14 don't want to wait until the actual trial date to ask  
15 those questions.

16 So let's leave it open, see how it goes.

17 JUDGE FARRAR: Okay. We ordered overnight  
18 transcript. Toby, does that mean tomorrow afternoon  
19 or Monday?

20 THE COURT REPORTER: I'm not sure when  
21 exactly that means. I do know that it's daily  
22 turnaround. I can't say for sure.

23 JUDGE FARRAR: Okay. Well, either by  
24 tomorrow afternoon or Monday the transcript will be  
25 available, and so we will put out an order promptly

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1 after receiving it, in an effort to capture what we  
2 just said. But I think it's all pretty clear.  
3 Anybody need me to review it? I assume you all were  
4 taking notes.

5 MR. HIBEY: We were taking notes, Your  
6 Honor.

7 MS. CLARK: I do have one question. On  
8 the collateral estoppel motion, did you want to  
9 establish a deadline, or leave that open, on the  
10 filing date?

11 JUDGE FARRAR: Well, all -- let's think  
12 back. Good question, Ms. Clark. Let's work  
13 backwards. All we will -- you need to file it early  
14 enough for Mr. Hibey and Mr. Wise to get a reply in,  
15 and that has to be early enough so that if there are  
16 any facts that we would say yes, under the doctrine  
17 those are established, you'd have those going in.

18 But we're not going to attempt to make a  
19 hypothetical ruling that would govern how we respond  
20 to objections at the trial. And basically I think we  
21 can say, or I think we've at least implied, that  
22 objections at the trial would just be carried with the  
23 case and will be the subject of post-trial briefs.

24 But I guess we would want to have the  
25 reply in by -- before Thanksgiving? Say by Wednesday,

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1 the 26th, so you --

2 MR. HIBEY: That's our reply?

3 JUDGE FARRAR: Yes. Well, I'm trying to  
4 work backwards here. We would want a reply by then.  
5 And then -- so that would mean -- could you file, Ms.  
6 Clark, by Monday, the 17th?

7 MS. CLARK: Yes, I believe so.

8 JUDGE FARRAR: So your collateral -- and,  
9 again, don't do a lot of legal research on the  
10 doctrine. You know, tell us what it means, what you  
11 think it means in this -- in this case. So we'd have  
12 your motion on the 17th, the reply the day before  
13 Thanksgiving, the 26th of November, and then that  
14 would give us early the week of the 1st to tell you  
15 whether there was anything we were going to rule on.

16 In fact, let's limit -- let's make it easy  
17 on yourselves, limit those to 10 pages. I think early  
18 on, a few months ago, we asked for some briefs and you  
19 all did them in remarkably short fashion, and they  
20 were remarkably useful to us. So sometimes shorter is  
21 better. Don't belabor anything.

22 MR. HIBEY: May I -- I'm sorry. I didn't  
23 mean to --

24 JUDGE FARRAR: No, go ahead.

25 MR. HIBEY: I was just wondering. I don't

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1 know the answer to this -- and, of course, I should be  
2 more astute and merely look it up -- but in civil  
3 practice, federal civil practice, and in many  
4 localities, there is a time limit on the -- on the  
5 amount of time to be taken in a deposition. I think  
6 it's seven hours or something like that. Do those  
7 rules apply in these proceedings, or is it just open  
8 ended?

9 JUDGE FARRAR: I have not -- I have not  
10 encountered anything on that score. Ms. Clark, do you  
11 or any of your colleagues know how that has been  
12 handled here?

13 MS. CLARK: I don't know. We are checking  
14 to see if we have any rules here. I don't know any  
15 off hand.

16 JUDGE FARRAR: Yes. I haven't -- I don't  
17 recall ever seeing anything in the regulations. I  
18 don't know if any boards have been called on to put  
19 particular limits on it. I mean, do you -- are you  
20 envisioning it could be more than a day?

21 MS. CLARK: I certainly don't expect so.

22 MR. HIBEY: Judge, I can't imagine that it  
23 should even come close to that.

24 JUDGE FARRAR: Then, why -- unless  
25 somebody moves otherwise, let's, you know, limit it to

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1 one ordinary business day. Mr. Hibey, is that  
2 roughly --

3 MR. HIBEY: Thank you, Your Honor.

4 JUDGE FARRAR: Is that, you know -- you  
5 know, seven-hour day, whatever.

6 MR. HIBEY: Yes, Your Honor.

7 JUDGE FARRAR: Okay?

8 MR. HIBEY: All right.

9 JUDGE FARRAR: And to the extent that you  
10 can make it convenient for Mr. Geisen. I mean, a  
11 Monday, you know, where he could come in on Sunday and  
12 get back Monday night, keeps him out of work for one  
13 day, whereas a Wednesday, you know, might cost him --  
14 a long Wednesday could cost him, you know, three days  
15 of work. So to the extent that you can arrange it  
16 with the minimal disruption for his work efforts, that  
17 would be helpful. But the deposition will be taken  
18 one way or the other.

19 MR. HIBEY: Thank you, Your Honor.

20 JUDGE FARRAR: We can wait until later to  
21 see what the post-hearing filings would be, but I am  
22 -- you know, as brief as everything is going to be  
23 ahead of time, the post-hearing filings may need --  
24 may need to be very thorough. But we don't have to  
25 decide that until actually the end of the hearing.

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1 Maybe we'll be in a better position then to do it.

2 All right. Well, we'll be on call, if you  
3 all need us. But I think if you will work under the  
4 directions we have given, and you all have suggested  
5 and agreed upon, we can both make sure that everyone  
6 is as prepared as need be, and that the hearing is  
7 conducted and we get to the hearing in an expedited  
8 fashion.

9 Anybody else have anything they need to  
10 bring up?

11 MS. CLARK: No, Your Honor.

12 JUDGE FARRAR: Mr. Hibey?

13 MR. HIBEY: No, Your Honor.

14 JUDGE FARRAR: Okay. Well, thank you all,  
15 and we will get out an order summarizing this. But  
16 for now, full speed ahead.

17 MR. HIBEY: Thank you, Your Honor.

18 JUDGE FARRAR: Okay. Thank you, all.

19 (Whereupon, at 4:51 p.m., the proceedings  
20 in the foregoing matter were concluded.)  
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