November 17, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	ASLBP No. 06-845-01-EA

NRC STAFF MOTION FOR COLLATERAL ESTOPPEL

INTRODUCTION

On June 24, 2008, following David Geisen's conviction and sentencing in a federal criminal proceeding, Mr. Geisen requested "a hearing before this Board to schedule proceedings addressing the question of whether Mr. Geisen's 2006 debarment by the NRC should be terminated *instanter*."[1] On October 23, 2008, the Atomic Safety and Licensing Board ("Board") convened a conference call with counsel for Mr. Geisen and the staff of the U.S. Nuclear Regulatory Commission ("Staff") to determine the schedule for the path forward in this proceeding. The Board directed the Staff to file a collateral estoppel motion by November 17, 2008.[2] Pursuant to that direction, the Staff herein moves to use collateral estoppel from the guilty verdict and underlying facts of Counts 1, 3, and 4 in *U.S. v. Geisen* to conclusively establish the Staff's charge that Mr. Geisen knowingly provided materially inaccurate and incomplete information to the NRC in Serial Letter 2744.

[1] Letter from Richard Hibey to the Board (June 24, 2008).

[2] *Transcript of Pre-Hearing Conference ITMO David Geisen* at 731 (Oct. 23, 2008); Memorandum and Order (Summarizing Conference Call) at 3-4 (Nov. 3, 2008). This motion was originally limited to 10 pages; however, following an Unopposed NRC Staff Motion for a Page Limit Extension (Nov. 12, 2008), the Board issued a Memorandum and Order (Extending Page Limits) (Nov. 13, 2008) granting the Staff a 25 page limit.

BACKGROUND

On January 4, 2006, the NRC Staff ("Staff") issued to Mr. Geisen an immediately effective Order prohibiting him from any involvement in NRC-licensed activities for a period of five years.[3] The Order was predicated on the Staff's determination that "Mr. David Geisen, while employed by the licensee, engaged in deliberate misconduct by deliberately providing FENOC and the NRC information that he knew was not complete or accurate in all material respects to the NRC, a violation of 10 CFR 50.5(a)(2)."[4] Specifically, the Order set forth six instances in which Mr. Geisen deliberately provided materially incomplete or inaccurate information to the NRC: Serial Letter 2731; Serial Letter 2735; Serial Letter 2744; an October 3, 2001 teleconference; an October 11, 2001 briefing to the Commissioners' technical assistants; and a November 9, 2001 ACRS meeting.[5] On February 23, 2006, Mr. Geisen submitted an Answer and Demand for an Expedited Hearing, denying the NRC's charges and requesting a hearing.[6]

Thereafter, on January 19, 2006, a Grand Jury in the Northern District of Ohio returned a five-count criminal indictment against Mr. Geisen for violating 18 U.S.C. §§ 1001 (False Statements) and 1002, based on some elements that are essentially the same as those underlying the Staff's Order.[7] On February 1, 2007, the Commission

[3] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-05-052 (Jan. 4, 2006) (ML053560094) ("Order").

[4] *Id.* at 14.

[5] *Id*.

[6] Specifically, Mr. Geisen responded to the NRC's charge regarding Serial Letter 2744, denying it in total. Answer and Demand for an Expedited Hearing (Feb. 23, 2006) ("Answer") at 7-8.

[7] In essence, both claim that Mr. Geisen deliberately provided materially incomplete or inaccurate information to the NRC on behalf of his former employer FirstEnergy Nuclear Operating Company ("FENOC"), the licensee for the Davis-Besse Nuclear Power Station, in (continued. . .)

granted a Staff motion to hold the proceeding in abeyance pending the outcome of the criminal proceeding against Mr. Geisen.[8] Mr. Geisen's criminal trial began on October 1, 2007 and concluded, following eleven days of trial and four days of deliberation, on October 30, 2007.[9] The federal criminal jury found Mr. Geisen guilty of three of the five counts contained in the indictment, and on May 2, 2008, the federal district court judge sentenced him.

Mr. Geisen has since agreed to a joint stipulation of facts for the hearing, admitting that the NRC submissions cited in the Order were inaccurate and/or incomplete and were material to the NRC.[10] Therefore, the only remaining issue in this proceeding relates to Mr. Geisen's knowledge at the time the statements were submitted.

Based on the evidence presented at the criminal trial, it is apparent that the jury convicted Mr. Geisen on Counts 1, 3, and 4 of the indictment because they found beyond a reasonable doubt that Mr. Geisen had the requisite knowledge after October 17, 2001, but before October 30, 2001. Thus, in addition to the facts stipulated to by both parties,[11] collateral estoppel establishes that Mr. Geisen violated § 50.5 through Serial Letter 2744, submitted on October 30, 2001. Therefore, the Board should find it conclusively established that Mr. Geisen deliberately provided certain materially

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(. . .continued)
written responses and oral presentations regarding Bulletin 2001-01 "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" (Aug. 3, 2001) (DOJ Ex. 29) ("Bulletin").

[8] *David Geisen*, CLI-07-6, 65 NRC 112, 120 (2007).

[9] Mr. Geisen was tried along with Rodney Cook, a FENOC contractor.

[10] Attachment 2, Joint Stipulations.

[11] *Id.* at 2, 8-10.

incomplete and inaccurate information to the NRC when he helped author, and concurred on, Serial Letter 2744.

DISCUSSION

I. LEGAL STANDARD GOVERNING COLLATERAL ESTOPPEL IN NRC ADJUDICATIONS

Collateral estoppel "precludes the relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies."[12] The Supreme Court has stated, as far back as 1951, that it "is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding."[13] Further, the now defunct Atomic Safety and Licensing Appeal Board ("ALAB") has found that it "is equally settled that collateral estoppel is as applicable in administrative adjudicatory proceedings as it is in the judicial arena."[14] The ALAB went on to say that "a judicial decision is entitled to precisely the same collateral estoppel effect in a later administrative proceeding as it would be accorded in a subsequent judicial proceeding."[15]

In order to preclude relitigation of an issue, four elements must be present:

> (1) the issue sought to be precluded must be the same as that involved in the prior action;
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> (2) that issue must have been actually litigated;
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> (3) it must have been determined by a valid and final judgment; and

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[12] *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977).

[13] *Emich Motors Corp. v. General Motors Corp*., 340 U.S. 558, 568 (1951).

[14] *Davis-Besse*, ALAB-378, 5 NRC at 561.

[15] *Id*.

> (4) the determination must have been essential to the prior judgment.[16]

Further, "the party to which the estoppel is to be applied must have been a party, or in privity with a party, that litigated the issue in the prior proceeding."[17] The application of collateral estoppel is not a discretionary factor; as long as the moving party proves that the four elements are satisfied and there are no "overriding competing public policy considerations," a Board must apply collateral estoppel.[18] It should be noted that the "correctness of the prior decision is not, however, a public policy factor upon which the application of the doctrine of collateral estoppel depends."[19] Therefore, a Board is not to look behind the decision rendered to determine "whether its findings of fact and conclusions of law were well founded;" "it is enough that the tribunal had jurisdiction to render its decision."[20]

II. COLLATERAL ESTOPPEL ESTABLISHES THAT MR. GEISEN VIOLATED § 50.5(a)(2) THROUGH SERIAL LETTER 2744

A. Collateral Estoppel Applies Even Though the Jury Rendered a General Guilty Verdict

Mr. Geisen was charged with five counts of violating 18 U.S.C. §§ 1001 and 1002. Mr. Geisen was found guilty on three of those five charges, Counts 1, 3 and 4,

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[16] *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd,* ALAB-575, 11 NRC 14 (1980).

[17] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 182 (2002). "This has assured that a 'full and fair' opportunity to litigate the issue has been provided the party at some point and has avoided the possibility that a party will be denied due process of law." *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 NRC 1423, 1460 (1982).

[18] *Davis-Besse*, ALAB-378, 5 NRC at 563-64 n.7.

[19] *PFS*, LBP-02-20, 56 NRC at 173.

[20] *Davis-Besse*, ALAB-378, 5 NRC at 562-63.

each of which contains elements related to Serial Letter 2744. Count 1 contains the charge that:

> From on or about September 4, 2001, through on or about February 16, 2002 . . . David Geisen . . . did knowingly and willfully conceal and cover up, and cause to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the government of the United States, to wit, the condition of Davis-Besse's reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head. . . . The defendant[] employed the following tricks, schemes, and devices: . . . On or about October 30, 2001, ...David Geisen . . . caused Serial Letter Number 2744 to be forwarded to the NRC. This submission included photographs taken from the videotapes of the inspections of the reactor vessel head, indicating that the photographs were "representative" of the condition of the reactor vessel head, but which omitted portions of the videos showing substantial deposits of boric acid.[21]

Although the subject of Count 3 is Serial Letter 2735, two of the listed materially false statements are identical to statements submitted on the same day in Serial Letter 2744, though not referenced in Count 4:

> "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendant[] well knew, significantly fewer than 65 nozzles were viewed.
>
> "[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program," whereas, as the defendant[] then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken.[22]

[21] Attachment 1, Indictment at 6, 9.

[22] *Id.* at 10-11.

Count 4 stated generally that:

> [o]n or before October 30, 2001 . . . [Mr. Geisen] did knowingly and willfully make, use, and cause others to make and use a false writing that is, a letter to the NRC identified as Serial 2744, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States.[23]

Count 4 then specifically lists six materially false statements contained in Serial 2744 that Mr. Geisen knowingly submitted to the NRC:

> (1) "[i]n 1996 during 10 RFO, 100% of nozzles were inspected by visual examination"
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> (2) "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated by nozzle number"
>
> (3) "[t]he following pictures are representative of the head in the Spring 1996 Outage. The head was relatively clean and afforded a generally good inspection"
>
> (4) "[b]ecause of its location on the head, [a pile of boric acid] could not be removed by mechanical cleaning but was verified to not be active or wet and therefore did not pose a threat to the head from a corrosion standpoint"
>
> (5) "these attached pictures are representative of the condition of the drives and the heads" and
>
> (6) "[t]he photo for No. 19 depicts in the background the extent of boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives"

To find a defendant guilty of § 1001, the government must prove five elements beyond a reasonable doubt. "The government must demonstrate that:

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[23] *Id.* at 12.

> (1) the defendant made a statement;
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> (2) the statement is false or fraudulent;
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> (3) the statement is material;
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> (4) the defendant made the statement knowingly and willfully; and
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> (5) the statement pertained to an activity within the jurisdiction of a federal agency."[24]

Similar to charges of conspiracy, the jury only needed to find that one of the allegedly false statements listed in the indictment was knowingly submitted to the NRC. This creates a challenge, which can be overcome, for purposes of collateral estoppel when the decision was rendered by a general verdict of the jury without special or particularized findings, indicating which of the statements listed in the indictment were found to have been both materially false and knowingly and willfully submitted to the NRC. In a conspiracy case dealing with the same general verdict collateral estoppel issue, the Supreme Court stated that:

> such a verdict does not establish that defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge [in the next case], upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts.[25]

1. Illustrative Caselaw

There is no guidance in NRC caselaw on how a Board is to apply collateral estoppel to general guilty verdicts. However, a case originating in the former U.S.

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[24] *U.S. v. Logan*, 250 F.3d 350, 361 (6th Cir. 2001).

[25] *Emich Motors Corp.*, 340 U.S. at 569.

Immigration and Naturalization Service ("INS")[26] within the U.S. Department of Justice ("DOJ") provides a model. In *Otherson v. Dep't. of Just., Immigr. & Naturalization Serv.*, Jeffrey Otherson, a former border patrol agent for INS, was discharged by INS after he was criminally convicted of carrying out a pre-planned scheme to physically abuse aliens while working.[27] INS's basis for discharge was his "mistreatment of aliens" and cited the "same acts of misconduct contained in the . . . information on which [he] had been convicted."[28] Otherson appealed his INS discharge to the Merit Systems Protection Board ("MSPB"), where "INS bore the burden of proving beyond a preponderance of the evidence . . . that Otherson's removal would 'promote the efficiency of the [federal] service[]'."[29]

To prove that Otherson had indeed mistreated aliens, INS used Otherson's criminal conviction and also offered the testimony of the INS official who removed Otherson.[30] The MSPB presiding official reviewed the entire record of the criminal proceeding, found that collateral estoppel applied to the factual issues of misconduct, and affirmed Otherson's removal.[31] Otherson sought review before the full MSPB, but the Board denied the petition for review stating that the presiding officer's application of

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[26] The governmental function of this particular case is now handled by U.S. Customs and Border Protection.

[27] *Otherson*, 711 F.2d 267, 269 (D.C. Cir. 1983).

[28] *Id.* at 270.

[29] *Id.* at 270-71.

[30] *Id.* at 271.

[31] *Id.*

collateral estoppel was proper.[32] Finally, Otherson sought review before the Circuit Court for the District of Columbia.

Otherson challenged the MSPB decision in the Circuit Court on the grounds that the underlying facts of the criminal conviction are not subject to collateral estoppel because, *inter alia*, there were "no special findings of fact."[33] Because the criminal conviction was based, in part, on a conspiracy charge, Otherson argued that:

> [p]erhaps . . . the [criminal] judge's general verdict did not decide in the government' favor on every fact the government alleged and to which the government's witnesses testified. Perhaps the court found Otherson's own involvement to be less direct and substantial than alleged, illegal only on grounds of conspiracy or aiding and abetting.[34]

The court, however, found that argument "unconvincing."[35] The court found that Otherson did not meet his burden for challenging the use of collateral estoppel by showing that "a rational factfinder could have grounded its verdict upon an issue other than that which the party seeks to foreclose from consideration."[36] Thus, according to the Circuit Court, the trial judge determining whether to apply collateral estoppel to facts contained within a general verdict is to "examine[] the record of the prior trial in detail to see if the [jury] might have disbelieved some aspects of the acts charged. . . . The [trial

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[32] *Id.*

[33] *Id.* at 274.

[34] *Id.*

[35] *Id.*

[36] *Id. quoting Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

judge's] examination [is] not to be 'hypertechnical,' but to be conducted 'with realism and rationality'."[37]

In *Otherson*, the Circuit Court found that the "only grounds the judge at the criminal trial had for doubting the government's version of events was Otherson's cross-examination, which made general attacks on the witnesses' credibility." The Circuit Court went on to state that the "MSPB official concluded that the [criminal] judge must have found the government's witnesses credible, and thus that 'it was necessary and essential for the court to find that the defendants did commit the acts listed in the pleadings'."[38] Therefore, the MSPB presiding officer's use of collateral estoppel was "perfectly reasonable."[39]

2. Application to Instant Case

Applying the *Otherson* decision to this case, the Board should examine the record of the criminal case "with realism and rationality" to determine which charges within Counts 1, 3, and 4 are supported by evidence a reasonable jury could have accepted. Further, the Board should hold Mr. Geisen to his burden of proof to show that "a rational factfinder could have grounded its verdict upon an issue other than that which the party seeks to foreclose from consideration."[40] If after a detailed, but not "hypertechnical" evaluation of the record, there is no rational evidence to support a different finding, collateral estoppel should apply. As explained below, the Staff believes that after such a review of the criminal case, it is appropriate to use collateral estoppel

[37] *Id.* at 274.

[38] *Id.*

[39] *Id.*

[40] *Id. quoting Ashe*, 397 U.S. at 444.

from the guilty verdicts and underlying facts of Counts 1, 3, and 4 to conclusively establish the Staff's charge that Mr. Geisen knowingly provided materially inaccurate and incomplete information to the NRC in Serial Letter 2744.

B. The Issue to be Precluded is the Same as in the Prior Action

Count 4 directly, and Counts 1 and 3 secondarily, allege that Mr. Geisen knowingly submitted materially false information to the NRC in Serial Letter 2744. That is the basis of one of Mr. Geisen's § 50.5 violations. Further, Mr. Geisen provided stipulations that certain statements contained in Serial Letter 2744 were materially incomplete and/or inaccurate.[41] Some of those statements were also contained within the indictment.[42] Therefore, it is appropriate to use collateral estoppel from the guilty verdicts and underlying facts of Counts 1, 3, and 4 to conclusively establish the only issue now remaining before this Board, that Mr. Geisen knowingly provided materially inaccurate and incomplete information to the NRC in Serial Letter 2744.

C. The Issue Was Actually Litigated

Count 1, 3, and 4 were fully litigated in the criminal trial as evidenced by the guilty verdict and supporting testimony, on direct and cross-examination, totaling eleven days of trial and well over 2,000 pages of transcript.[43]

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[41] Attachment 2, Joint Stipulations at 8-10.

[42] *See* the chart contained in Attachment 3. The chart provides a visual representation detailing: (1) the statements in the indictment that were essential to the jury's guilty verdicts and (2) the stipulations Mr. Geisen has since made regarding the inaccuracy and/or incompleteness of those statements. Mr. Geisen has also stipulated to the materiality of all the written responses and oral presentations charged in the Order. Attachment 2, Joint Stipulations at 2.

[43] This includes the evidence and testimony against Mr. Geisen's co-defendant Rodney Cook.

D. The Issue Was Determined by a Valid and Final Judgment

The criminal trial against Mr. Geisen, resulting in jury verdicts of guilty on three counts of the criminal indictment, concluded with the sentencing of Mr. Geisen, even though a notice of appeal has been filed with the United States Court of Appeals for the Sixth Circuit. Proceedings are generally considered "final" or "concluded" following the completion of the criminal proceeding, regardless of whether an appeal has been taken.

In *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), the ALAB applied collateral estoppel to a case that was pending on appeal before the Court of Appeals for the Sixth Circuit.[44] However, the ALAB retained jurisdiction over the matter, stating that

> [s]hould the Sixth Circuit reverse, vacate or significantly modify the district court's ruling, within thirty days, thereafter the [party whom collateral estoppel was used against] may file a motion with [the ALAB] requesting such relief as it may deem appropriate in light of that development.[45]

Therefore, in similar circumstances to the instant case, the judgment was considered final. Further, the U.S. Court of Appeals for the Federal Circuit stated in *Rice v. Dept. of the Treasury* that with respect to cases before the MSPB and the International Trade Commission, "[t]he law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding."[46] Therefore, the jury verdicts are a valid and final judgment.

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[44] *Davis-Besse*, ALAB-378, 5 NRC at 560-61.

[45] *Id.* at 561.

[46] *Rice*, 998 F.2d 997, 999 (Fed. Cir. 1993).

E. The Determination Was Essential to the Prior Judgment

1. Jury's Determination of Mr. Geisen's Knowledge

As discussed above, because Mr. Geisen's criminal conviction was handed down in a general verdict, this creates a more complex case for determining which issues were essential to the prior judgment. This is especially true here, where, upon first glance, the verdicts might appear inconsistent.[47] A review of the transcript, however, demonstrates that the verdicts are easily explained based on Mr. Geisen's increasing involvement and knowledge over time. As shown below, the jury lost all reasonable doubt about Mr. Geisen's knowledge regarding the 10, 11, and 12RFO inspections after Serial Letter 2735 was submitted to the NRC, on October 17, 2001.[48]

The criminal record clearly established that Serial Letter 2744 was inaccurate and incomplete and that it was material to the NRC. The conclusions of the prosecution's expert witnesses[49] on the inaccurate and incomplete nature of the written responses and oral presentations were subjected to cross examination, which only served to further explain their methodology. The experts' findings were not challenged by expert testimony on behalf of Mr. Geisen.[50] Those experts also specifically testified

[47] *See* Memorandum of Points and Authorities in Support of David C. Geisen's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial at 25-26 (Nov. 27, 2007) ("Acquittal Motion").

[48] *See* Government's Memorandum in Opposition to Motion for Post-Trial Acquittal or New Trial at 20, 31 (Dec. 18, 2007) ("Government's Memorandum"); Attachment 4, *U.S. v. Geisen*, Case No. 3:06 CR 712, ORDER (Apr. 22, 2008).

[49] The prosecution's expert witnesses were Melvin Holmberg, a reactor inspector for the NRC, and Allen Hiser, a Branch Chief for the Steam Generator Integrity and Chemical Engineering Brach of the Nuclear Reactor Regulation Division of the NRC.

[50] Mr. Geisen provided expert testimony from Daniel Bullen, a FENOC contractor and Senior Managing Engineer for Exponent Failure Analysis Associates, to rebut the prosecution's expert testimony of Jim Davis, who testified on corrosion and the development of the hole in the RPV head. Neither of those testimonies addressed the inaccurate or incomplete nature of the (continued. . .)

that Serial Letter 2744 was reviewed by the NRC in determining whether to take any action against FENOC, thus demonstrating materiality.

Additionally, the evidence was uncontroverted "that in August of 2001, [Mr.] Geisen was familiar with the importance of nozzle cracking and knew what would be necessary to detect it by visual inspection."[51] For example, Mr. Geisen testified that in August of 2001 he knew that NRC Bulletin 2001-01 required plants to report on past inspections to determine whether they were capable of finding boric acid indicative of nozzle leakage.[52] He further testified that by December 13, 2000 he knew that the amount of boric acid representative of nozzle leakage is very small and that chances were not good of finding evidence of such nozzle leakage without a clean head.[53] He also testified that in January 2001 he knew Davis-Besse had a history of flange leakage that would cause boric acid to appear on the head, which would in turn not allow nozzles to be inspected wherever boron was.[54]

The evidence also showed that Mr. Geisen became increasingly involved with Davis-Besse's Bulletin responses over time. By his own admission, he was assigned by his supervisor, Stephen Moffitt, with the responsibility for ensuring that the inspection results were reported to the NRC in October of 2001.[55] With his increasing involvement,

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(. . .continued)
written responses and oral presentations.

[51] Government's Memorandum at 11-12.

[52] Transcript of Record, *U.S. v. Geisen*, DOCKET NO. 3:06-CR-712 at 1965 (2007) ("Tr.").

[53] *Id.* at 1955.

[54] *Id.* at 1957.

[55] *Id.* at 1910.

Mr. Geisen obtained more knowledge regarding the actual condition of the head, as shown by the past inspections. Ultimately, his increasing knowledge reached critical mass for the jury post-October 17, 2001, when Serial Letter 2735 was issued.

Evidence of Mr. Geisen's knowledge of past inspections goes as far back as June 27, 2001, when Mr. Geisen approved and signed an intra-company memorandum to defer a Mode 5 head inspection until 13RFO.[56] As part of the discussion, the memo stated that "[l]arge boron leakage from a CRDM flange was observed. This leakage did not permit the detailed inspection of CRDM nozzles."[57] Mr. Geisen testified at trial that by mid-August 2001 he knew that the 2000 inspection was not a 100% thorough inspection because there was flange leakage.[58] Further, Mr. Geisen attested to receiving an August 17, 2001 e-mail from Prasoon Goyal, a FENOC design engineer under his chain of command, that discussed the possibility of Davis-Besse not taking credit for the 2000 inspection and noting that the e-mail spoke to the unreliable nature of that inspection because of flange leakage.[59]

More importantly, Mr. Geisen admits to lifting the Mode 4 restraint in CR 2000-1037 on April 27, 2000.[60] The CR contained two important statements that show Mr. Geisen had knowledge regarding the extent of the boron accumulation in the 2000 inspection that differed greatly from what he wrote and signed off on in Serial Letter

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[56] Memorandum from Prasoon Goyal to Distribution re: Mode 5 Reactor Vessel Head Inspection Recommendation (June 27, 2001) (DOJ Ex. 26).

[57] *Id.*

[58] Tr. at 1967.

[59] *Id.* at 1966-67.

[60] *Id*. at 1947; CR 2000-1037 (April 6, 2000) (DOJ Ex. 15).

2744: (1) "Large deposits of boron have accumulated on the top of the insulation and on the Reactor Vessel Head" and (2) "Initial Reactor Vessel Head inspection conducted on 4/5/2000 revealed an accumulation of boron on the Southeast Reactor head flange between the head and the studs. Boron deposits were 'lava like' and originate from the 'mouse holes' and CRD flanges."[61]

Although there was evidence to show that Mr. Geisen viewed the videotapes of past inspections as early as August of 2001,[62] he did not admit doing so until sometime during the two weeks following the October 3, 2001 teleconference.[63] Notably, this was shortly after: (1) Mr. Geisen was pulled out of the INPO exit de-briefing by an agitated Guy Campbell, site Vice President of Davis-Besse, to discuss a phone call from Brian Sheron to Bob Saunders, President and Chief Nuclear Officer of FENOC, suggesting that the NRC might shut down Davis-Besse;[64] (2) Mr. Geisen told his supervisors that they had given misinformation to the NRC;[65] and (3) Mr. Moffitt told Mr. Geisen that he was responsible for verifying the results of Andrew Siemaszko's nozzle-by-nozzle table

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[61] CR 2000-1037 at 4.

[62] John Martin, a former NRC Regional Administrator in two regions and, at the relevant time, a private contractor hired by FENOC's Company Nuclear Review Board in 2002 to look into management and organizational problems related to the RPV head corrosion, testified regarding an interview he had with Mr. Geisen in connection with that review. Tr. at 480-81. Mr. Martin testified that Mr. Geisen stated to him that he reviewed the videotapes of past inspections in August of 2001 in preparation for interactions with the NRC. *Id.* at 480-82.

[63] *Id*. at 1911-13.

[64] *See* E-mail from Dale L. Miller, FENOC Compliance Supervisor, to Group, cc: David C. Geisen, "CRD Nozzle Bulletin 2001-01 Recent Developments – URGENT" (Sept. 28, 2001) (DOJ Ex. 69). Although there is testimony from Mr. Moffitt that Mr. Geisen might actually have been on the call, Tr. at 1222, Mr. Geisen stated that he was pulled out of the INPO exit de-briefing after the phone call, *Id.* at 2005.

[65] Tr. at 1919-20.

for Serial Letter 2735.[66] Considering all of these factors, the jury, giving Mr. Geisen reasonable doubt, did not attribute knowledge of the tapes to him until October 17, 2001, the same day Serial Letter 2735 was submitted, exactly two weeks after October 3, 2001.

The jury had strong evidence that reviewing the videotapes gave Mr. Geisen knowledge that the statements submitted in Serial Letter 2744 were false. For instance, a 1998 Condition Report described the 11RFO videotapes, stating

> The video tape of the reactor vessel head inspection (4/24/98) through the weep holes was received. It showed that most of the head area was covered with an uneven layer of boric acid along with some large clumps of boric acid.[67]

With respect to 12RFO, even a cursory review of the 2000 inspection videotape shows mounds of boric acid piled high on the head.[68] As Terry Tabbert, a FENOC employee in the Radiation Protection Group involved in the 12RFO head cleaning, testified while narrating to the jury the 12RFO "as left" video, "[y]ou can see the chunks; it's in a dome area, about eight foot up to the top of the dome, and a lot of that boron that was piled up high up in there, wedged up in between those nozzles; that's what we were trying to get out."[69] Therefore, by viewing those tapes, Mr. Geisen knew that the information submitted in Serial Letter 2744 was materially false and it is reasonable to find that the jury concluded such.

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[66] *Id.* at 1242-45.

[67] Potential Condition Adverse to Quality Report (PCAQR) 1998-0767 (Apr. 25, 1998) (DOJ Ex. 9).

[68] "Within the first ninety seconds of that video record, the viewer sees nozzles that are all but encased in boric acid, which extend from the surface of the reactor vessel head to the insulation above." Government's Memorandum at 20-21.

[69] Tr. at 186-87.

Finally, Mr. Geisen received a copy of the Gibbs Report on September 14, 2001, which stated that "on completion of 12RFO, the Reactor Vessel head did have boric acid crystal deposits of considerable depth left in the center top area of the head, since cleaning of this area at that time was not successful in removing all the deposits (partly due to limited access)."[70] Mr. Geisen testified that although he may have received it on that date that it probably sat on his desk for quite a while because of the INPO evaluations before he actually read it.[71] Mr. Moffitt testified that Davis-Besse's INPO evaluation was occurring during the month of September and that the exit-debriefing was on September 28, 2001.[72] Therefore, although Mr. Geisen may not have read it in the middle of September, a reasonable interpretation of the testimony finds that he read it prior to October 30, 2001. Taking all the above evidence together, it is therefore reasonable to find that the jury concluded Mr. Geisen had sufficient knowledge of the past inspections post-Serial Letter 2735 and pre-Serial Letter 2744.

2. Mr. Geisen's Knowledge Applied to Counts 1, 3, and 4

As explained above, Mr. Geisen's convictions on Counts 1, 3, and 4 of the indictment were premised on a determination that there was no reasonable doubt Mr. Geisen had knowledge of the falsity of FENOC's submissions after October 17, 2001. Therefore, the jury convicted him on all counts that contained charges relating to post-October 17, 2001 knowledge.[73] This explains why the jury did not surmount the

[70] Letter to Mark McLaughlin from Gregory A. Gibbs, with Attachment 1 (Sept. 14, 2001) at 1 (DOJ Ex. 65) ("Gibbs' Report").

[71] Tr. at 1982-83.

[72] *Id.* at 1218-19, 1222.

[73] For a complete list of the false statements contained in Counts 1, 3, and 4 that happen after Serial Letter 2735 was submitted, are supported by evidence of Mr. Geisen's knowledge, (continued. . .)

reasonable doubt standard and he was not convicted on Count 2, which related to Serial Letter 2735 and contained similar statements to Counts 3 and 4, submitted on October 17, 2001.

Mr. Geisen may still argue that the guilty verdicts on Counts 3 and 4 are inconsistent and irreconcilable with the not guilty verdict on Count 5. However, although the listed statement is similar to those in Counts 3 and 4, the core of Serial Letter 2745 was FENOC's probabilistic risk assessment, and DOJ was prevented from presenting argument or evidence on core damage, radioactive release, or possible public risk from the corrosion hole.[74] Also, the listed statement fell under the heading "Assumptions," and it is most likely that the jury treated the statement as something other than a factual assertion.[75] Thus, without being able to present evidence or argument on the basis of Serial Letter 2745, and with the probability that the jury did not treat the statement as a fact, it is understandable that the jury would not have enough evidence to satisfy the beyond a reasonable doubt burden.

Finally, it is instructive to note that Judge Katz adopted the Government's Memorandum, where this theory was propounded, stating that "[i]t is the conclusion of this Court that the Government's reasoning and conclusions warrant denying Defendant's motion under consideration."[76] DOJ's rationale for the jury's verdict was that: "the evidence presented at trial showed a crescendo of knowledge attributable to

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(. . .continued)
and are stipulated to be materially incomplete and/or inaccurate by Mr. Geisen, please *see* Attachment 3.

[74] *See* Government's Memorandum at 20, 31.

[75] *Id.* at 21.

[76] Attachment 4 at 3.

[Mr. Geisen]," that "a reasonable Jury could conclude that Geisen's review [of the videotapes] occurred just after Serial Letter 2735 went to the NRC, which was two weeks after the October 3 teleconference, but before [Mr.] Geisen approved Serial Letters 2741 and 2744," and that therefore, "the jurors started the clock on [Mr. Geisen's] knowledge as late as possible," right after Serial Letter 2735 was submitted.[77] Therefore, the Board should find Mr. Geisen collaterally esopped from challenging that he deliberately provided materially incomplete and inaccurate information[78] to the NRC when he helped author, and concurred on, Serial Letter 2744.

III. DELIBERATE IGNORANCE AND KNOWLEDGE

A. The Deliberate Ignorance Instruction

During the recitation of jury instructions, Judge Katz explained that "[t]he term 'knowingly and willfully' requires proof that the defendant made a statement or caused a statement to be made, with the knowledge that it was false with the intent to deceive."[79] In accordance with a request by the DOJ,[80] Judge Katz also recited a "deliberate ignorance" instruction.[81]

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[77] Government's Memorandum at 13, 17.

[78] *See* statements listed in Attachment 3.

[79] Tr. at 2236.

[80] *Id*. at 2293-2300.

[81] "Next, I want to explain something about proving a defendant's knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that a defendant deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements. But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concerned material facts -- I'm sorry, concealed -- let me read that over. I'm sorry. But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or (continued. . .)

In cases brought under 18 U.S.C. § 1001, intent and knowledge need not be proved directly.[82] Therefore, it is acceptable to give a "deliberate ignorance" instruction as one approach to proving knowledge, as long as "there is some evidence of deliberate ignorance."[83] Deliberate ignorance is entirely separate from some lesser standard of intent, such as carelessness, negligence, or foolishness. The 6th Circuit has explained that:

> A deliberate ignorance instruction is proper where the evidence shows the defendant attempted to escape conviction "by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." Such an instruction should be used with caution to avoid the possibility that the jury convict on the lesser standard that the defendant *should* have known his conduct was illegal. Thus, the instruction should only be given if the evidence shows that the defendant was subjectively aware of a high probability of the existence of illegal conduct, and he purposely contrived to avoid learning of the illegal conduct.[84]

In some cases, the 6th Circuit has used the terms "deliberate ignorance" and "willful blindness" interchangeably.[85]

(. . .continued)
included false statements and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide." Tr. at 2238-39.

[82] Sixth Circuit Criminal Pattern Jury Instruction, Chapter 13.00, "False Statements to the United States Government," § 13.01 "Committee Commentary Instruction 13.01" at http://www.ca6.uscourts.gov/ internet/crim_jury_insts/html/chap13_20.htm.

[83] Sixth Circuit Criminal Pattern Jury Instruction, Chapter 2.00 "Defining the Crime and Related Matters," § 2.09 "Deliberate Ignorance" at http://www.ca6.uscourts.gov/internet/ crim_jury_insts/html/ chap13_20.htm.

[84] *U.S. v. Springer*, 262 Fed.Appx. 703, 706 (6th Cir. 2008) (internal citations omitted).

[85] *See* Sixth Circuit Criminal Pattern Jury Instruction, Chapter 2.00 "Defining the Crime and Related Matters," § 2.09 "Deliberate Ignorance," *quoting U.S. v. Prince*, 214 F.3d 740, 760 (2000) at http://www.ca6.uscourts.gov/internet/crim_jury_insts/html/ chap13_20.htm.

Mr. Geisen has indicated on numerous occasions, both on the record[86] and off, that he intends to contest any Staff motion for collateral estoppel based upon the deliberate ignorance instruction. The Staff acknowledges that the 6th Circuit's deliberate ignorance instruction does not meet the NRC's deliberate misconduct standard, and instead would be classified as careless disregard. However, as explained below, an inappropriate deliberate ignorance instruction is considered harmless error as long as there is sufficient evidence of actual knowledge to support the conviction.[87] Here, there is more than enough evidence to reasonably find that the jury convicted on an actual knowledge standard, as opposed to deliberate ignorance.

B. The Jury Found Mr. Geisen Acted with Actual Knowledge, Rather than Deliberate Ignorance, in his Violation of § 1001

Regardless of the fact that acting with deliberate ignorance falls outside the Deliberate Misconduct Rule, the evidence reasonably shows that Mr. Geisen was convicted based upon his actual knowledge, as opposed to any deliberate ignorance on his part. In this case, Mr. Geisen has admitted that he understands the requirements of 10 C.F.R. § 50.9, that all information submitted to the NRC must be complete and accurate in all material respects.[88] There is ample evidence and testimony, as described above, that show Mr. Geisen had actual knowledge of the falsity of the statements made in Serial Letter 2744.

It is important to note that Mr. Geisen challenged the appropriateness of the deliberate ignorance instruction during the negotiations over jury instructions, arguing

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[86] *Transcript of Pre-Hearing Conference ITMO David Geisen* at 634-35 (July 21, 2008); *Transcript of Pre-Hearing Conference ITMO David Geisen* at 691 (Oct. 23, 2008).

[87] *U.S. v. Mari*, 47 F.3d 782, 785-86 (6th Cir. 1995).

[88] Tr. at 1985-86.

that there was no evidence to support deliberate ignorance and he apparently plans to base his appeal on the supposedly improper instruction.[89] He further challenged the instruction in his Acquittal Motion, definitively stating:

> The government presented no evidence Mr. Geisen consciously or intentionally avoided knowledge in order to avoid criminal liability. No witness claimed Mr. Geisen turned him away when he tried to tell Mr. Geisen the Serial Letters were false or misleading. No witness suggested Mr. Geisen had suspicions his statements to the NRC were false and intentionally avoided information that would confirm such suspicions. No document or statement of Mr. Geisen supported an inference that Mr. Geisen purposefully contrived to avoid learning of illegal conduct.[90]

The 6th Circuit has held that the giving of a deliberate ignorance instruction unsupported by evidence harmless as a matter of law so long as there is sufficient evidence of the defendant's actual knowledge to support a conviction.[91] The court reasoned that if there was insufficient evidence of deliberate ignorance, it must be concluded then that the jury convicted on the basis of actual knowledge; "[t]o conclude otherwise . . . [one] would have to assume that the jury ignored the jury instructions."[92] Judge Katz strongly echoed this in his denial of Mr. Geisen's Acquittal Motion, stating "This Circuit has repeatedly held that the instruction is harmless error where sufficient evidence of actual knowledge was present. This is the case here."[93] Judge Katz did not assume an improper

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[89] *See* Tr. at 2294-97; *Transcript of Pre-Hearing Conference ITMO David Geisen* at 634-35 (July 21, 2008).

[90] Acquittal Motion at 10.

[91] *Mari*, 47 F.3d at 785-86.

[92] *Id.* at 785.

[93] Attachment 4 at 3 (emphasis added).

conviction based on deliberate ignorance in the face of actual knowledge; therefore, the Board should not either.

CONCLUSION

For the reasons stated above, the Board should find it conclusively established, through the use of collateral estoppel from the guilty verdict and underlying facts of Counts 1, 3, and 4 in *U.S. v. Geisen*, that Mr. Geisen knowingly provided materially inaccurate and incomplete information to the NRC in Serial Letter 2744.

Respectfully submitted,

/RA/

Kimberly A. Sexton

Dated at Rockville, MD
this 17th day of November, 2008

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DAVID GEISEN, RODNEY COOK, and ANDREW SIEMASZKO, Defendants.	)	INDICTMENT CASE NO. 3:06CR712 JUDGE JUDGE KATZ Title 18, Sections 1001 and 2, United States Code

The Grand Jury charges:

Introduction

At all times relevant to this Indictment:

1. The Davis-Besse Nuclear Power Station ("Davis-Besse") was a nuclear power plant, located in Oak Harbor, Ohio, in the Northern District of Ohio, operated by the FirstEnergy Nuclear Operating Company, Inc. ("FENOC"), an Ohio Corporation. FENOC held a license to operate Davis-Besse, issued by the Nuclear Regulatory Commission ("NRC").

2. The defendant, DAVID GEISEN, was employed by FENOC as an engineering manager.

3. The defendant, ANDREW SIEMASZKO, was employed by FENOC as a Systems Engineer with responsibility for the reactor coolant system at Davis-Besse.

4. The defendant, RODNEY COOK, was a contractor-consultant employed by FENOC over several years, in part to assist with regulatory compliance matters at Davis-Besse.

5. When operating, Davis-Besse generated energy by using a nuclear chain reaction to heat a solution of water and boric acid, called "reactor coolant," to approximately 600 degrees Fahrenheit. The reactor coolant was contained in a "reactor pressure vessel" and maintained at approximately 2,000 pounds per square inch of pressure. Heat from the reactor coolant was used to make steam to drive turbines that turned electric generators.

6. Davis-Besse's normal operating cycle included outages at approximately two-year intervals, during which the lid to the reactor vessel, called the "reactor vessel head," was removed to allow the removal of spent nuclear fuel rods and the insertion of new fuel rods. The reactor vessel head was removed from the vessel during the 10th refueling outage ("RFO") in 1996, the 11th RFO in 1998, the 12th RFO in 2000, and the 13th RFO in 2002.

7. Operators used control rods to regulate the plant's energy output. When lowered into the reactor core, the control rods absorbed neutrons that would have otherwise sustained the nuclear chain reaction. Control rod drive mechanisms ("CRDM" or "CRDMs") were used to raise and lower the control rods within the reactor core through nozzles that penetrated and were welded to the reactor vessel head. There were sixty-nine nozzles in total, but only sixty-one nozzles had CRDMs attached to them.

8. On August 3, 2001, the NRC issued Bulletin 2001-01, which addressed a problem with CRDM nozzles that could lead to unsafe conditions at pressurized water reactors, like Davis-Besse. The Bulletin explained that the kind of weld used to attach CRDM nozzles to the

reactor vessel head could cause nozzles to crack. It also explained that this problem had been seen in France in the early 1990's and had been found in the United States in December 2000. In 2001, other plants in the United States also discovered cracked CRDM nozzles.

9. Although the NRC and the nuclear industry had considered the impact of nozzle cracks in the early 1990's, the Bulletin noted that recent discoveries had changed the NRC's understanding of the problem for two reasons. First, dangerous circumferential cracks had shown up earlier than expected. Second, the cracks caused only small deposits of boric acid residue on the reactor vessel head, contrary to previous NRC guidance that had suggested that leaking nozzles would produce substantial amounts of boric acid residue. The deposits were left behind when water evaporated from reactor coolant that had leaked onto the head. Small boric acid deposits came to be known as "popcorn" deposits, because of their size and shape. In light of this new information, the NRC Bulletin questioned whether the visual examinations then in use were adequate to detect nozzle cracking.

10. The Bulletin explained NRC expectations regarding future nozzle inspections and required plants to answer questions to help the NRC determine the extent of the nozzle crack problem at reactors in the United States. All facilities holding licenses to operate pressurized water reactors were required to report their nozzle inspection history and plans for future inspections. Facilities deemed to have the highest risk of nozzle cracking–including Davis-Besse–were required to provide detailed information about recent inspections of their reactor vessel heads and a description of anything that impeded those inspections. The highest-risk facilities were also required to report whether they intended to inspect their reactor vessel heads prior to December 31, 2001, and, if not, to provide information demonstrating that continued operation beyond that date would not violate regulatory requirements.

11. The defendants, DAVID GEISEN, ANDREW SIEMASZKO, and RODNEY COOK, together with others known to the grand jury, prepared responses to the Bulletin which were submitted to the NRC on the dates listed below. These responses were part of a scheme to persuade the NRC to agree that Davis-Besse could operate safely after December 31, 2001. The scheme involved making false and misleading statements and concealing material information about both the quality of past reactor vessel head inspections and the condition of the reactor vessel head. Before they were submitted, the responses were forwarded for review and approval to the defendants listed below, among others, and each signed an "NRC Letters Review and Approval Report" (also called a "greensheet") that indicated that he had received and approved the submission:

Date	Title	Signed By
September 4, 2001	Serial Letter 2731, Response to NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Head Penetration Nozzles" ("Serial Letter 2731")	DAVID GEISEN RODNEY COOK
October 17, 2001	Serial Letter 2735, Supplemental Information in Response to NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Head Penetration Nozzles" ("Serial Letter 2735")	DAVID GEISEN ANDREW SIEMASZKO RODNEY COOK
October 30, 2001	Serial Letter 2741, Responses to Requests for Additional Information Concerning NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" ("Serial Letter 2741")	DAVID GEISEN RODNEY COOK
October 30, 2001	Serial Letter 2744, Submittal of Results of Reactor Pressure Vessel Head Control Rod Drive Mechanism Nozzle Penetration Visual Examinations for the Davis-Besse Nuclear Power Station ("Serial Letter 2744")	DAVID GEISEN RODNEY COOK

Date	Title	Signed By
November 1, 2001	Serial Letter 2745, Transmittal of Davis-Besse Nuclear Power Station Risk Assessment of Control Rod Drive Mechanism Nozzle Cracks ("Serial Letter 2745")	DAVID GEISEN RODNEY COOK

12. Based on the information contained in the Serial Letters, the NRC agreed to FENOC's proposal that it be allowed to operate Davis-Besse beyond December 31, 2001. On December 4, 2001, the NRC sent FENOC a letter agreeing to Davis-Besse's continued operation until February 16, 2002.

13. On February 16, 2002, Davis-Besse shut down for refueling and inspection. On March 8, 2002, the reactor vessel head was discovered to have significant degradation, in the form of a corrosion hole. Subsequent investigation revealed that a crack in nozzle three, at the top of the reactor pressure vessel head, had allowed boric acid to leak onto the head, where it attacked the carbon steel head, causing a six-inch deep corrosion cavity.

14. NRC regulations required its licensees to ensure that information provided to the NRC be complete and accurate in all material respects. Title 10, Code of Federal Regulations, §50.9.

15. These introductory allegations are hereby re-alleged and incorporated by reference in Counts 1 through 5 of this Indictment.

COUNT 1

The Grand Jury charges:

1. From on or about September 4, 2001, through on or about February 16, 2002, in Oak Harbor, Ohio, in the Northern District of Ohio and elsewhere, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully conceal and cover up, and cause to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the government of the United States, to wit, the condition of Davis-Besse's reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head.

Manner and Means of Scheme

The defendants employed the following tricks, schemes and devices:

2. On or about September 4, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter 2731 to be forwarded to the NRC. The defendant, ANDREW SIEMASZKO, drafted portions of the Serial Letter, which were reviewed and approved by the defendants, DAVID GEISEN and RODNEY COOK. In Serial Letter 2731, the defendants described reactor vessel nozzle and head inspections, and limitations to accessibility of the bare metal of the reactor vessel head for visual examinations. In so doing, they deliberately omitted critical facts concerning the inspections and limitations on accessibility. In addition, they also falsely stated that the inspections complied with the requirements of Davis-Besse's "Boric Acid Corrosion Control Program."

3. On or about October 3, 2001, the defendants, DAVID GEISEN and RODNEY COOK, and other FENOC employees, held a telephone conference with NRC staff employees to discuss concerns of the staff regarding inspections described in Serial Letter 2731, which were

conducted during the 11th RFO (in 1998) and the 12th RFO (in 2000). During this telephone conference, the defendant, DAVID GEISEN, falsely stated that in 2000 FENOC had conducted a "100% inspection" of the reactor vessel head with the exception of some areas [five or six nozzles] where inspection was precluded because of "flange leakage." In fact, at least twenty-four nozzles were blocked from view because of boric acid.

4. On or about October 11, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and others met with Technical Assistants of NRC Commissioners and falsely represented as a "fact" that "[a]ll CRDM penetrations were verified to be free from 'popcorn' type deposits using video recordings from 11RFO or 12RFO."

5. On or about October 16, 2001, the defendant, RODNEY COOK, sought information from Davis-Besse personnel about whether it was true that visual inspections of some nozzles had been done during 11 RFO and 12 RFO, but had not been recorded on videotape. In 11 RFO the entire inspection was recorded on videotape and there were no unrecorded visual inspections. On or about October 17, 2001, the defendants, RODNEY COOK and ANDREW SIEMASZKO, approved Serial Letter 2735 with an attached table that falsely stated that there were 10 nozzles that had satisfactory visual inspections during 11 RFO, such that no video record was required of the nozzles.

6. On or about October 17, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter 2735 to be forwarded to the NRC. This submission conceded that portions of the reactor vessel head were obscured by boric acid in inspections during the 11th RFO (in 1998) and 12th RFO (in 2000) but falsely represented that in the inspection during the 10th RFO (in 1996) the entire reactor pressure vessel head was inspected. The submission attached a table prepared by the defendant, ANDREW SIEMASZKO,

that falsely stated that the entire reactor pressure vessel head was inspected during the 10th RFO and that the video recording of that inspection was void of head orientation narration.

7. On or about October 24, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and other FENOC employees met with NRC staff employees and represented that "all but 4 nozzle penetrations were inspected in 1996," and "[a]ll CRDM penetrations were verified to be free from 'popcorn' type boron deposits using video recordings from 10 RFO, 11RFO or 12RFO," and "[a] review of visual recordings as well as eye-witness accounts served as the means of the inspection."

8. Between on or about October 22, 2001, and October 30, 2001, the defendant, RODNEY COOK, deleted sections of Serial Letter 2741 that he was drafting, which truthfully stated that areas of the reactor pressure vessel head would not be viewable in the upcoming 13 RFO because of "pre-existing boric acid crystal deposits."

9. On or about October 30, 2001, the defendants, DAVID GEISEN and RODNEY COOK, caused Serial Letter 2741 to be forwarded to the NRC. The submission repeated and expanded on representations made in Serial Letters 2731 and 2735, including the representations that inspections were made in accordance with Davis-Besse's Boric Acid Corrosion Control Program, and included representations contained in a table prepared by the defendant, ANDREW SIEMASZKO, that the entire reactor vessel head was inspected during the 10th RFO and that the video of that inspection was void of head orientation narration. Serial Letter 2741 also stated that "[f]ollowing 12RFO, the [reactor pressure vessel] head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results."

10. On or about October 30, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter Number 2744 to be forwarded to the NRC. This submission included photographs taken from the videotapes of the inspections of the reactor vessel head, indicating that the photographs were "representative" of the condition of the reactor vessel head, but which omitted portions of the videos showing substantial deposits of boric acid.

11. On or about November 1, 2001, the defendants, DAVID GEISEN and RODNEY COOK, caused Serial Letter 2745 to be forwarded to the NRC. This submission, entitled "Davis-Besse Nuclear Power Station Risk Assessment of Control Rod Drive Mechanism Nozzle Cracks," expressly relied on false representations about the 1996 head inspection that were previously made in Serial Letters 2735 and 2741. The "risk assessment" contained in this submission used statistical techniques to convince the NRC that allowing Davis-Besse to operate until the Spring of 2002 would pose little risk of damage to the reactor core. The risk assessment was based, in part, on the stated, false assumption that "100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head."

12. On or about November 14, 2001, in Rockville, Maryland, the defendants, DAVID GEISEN and ANDREW SIEMASZKO, and other FENOC employees met with NRC staff employees at NRC headquarters to discuss prior head inspections, among other things.

13. On or about November 28, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and other FENOC employees made a presentation to the NRC staff to propose a February 16, 2002, shutdown date, and provided statistical information expressly relying on false representations previously made in Serial Letters 2735 and 2741 to argue that the risk of damage to the reactor core was low.

14. On or about November 29, 2001, the defendant, DAVID GEISEN, made a presentation to the FENOC Company Nuclear Review Board ("CNRB"), and falsely represented that a qualified visual inspection was performed in 1996 and that all but four CRDM nozzle penetrations were inspected.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 2

The Grand Jury further charges:

On or before October 17, 2001, in Oak Harbor, Ohio, in the Northern District of Ohio, and elsewhere, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2735, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

A. "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendants then well knew, significantly fewer than 65 nozzles were viewed;

B. "[i]n 1996, during 10 RFO, the entire RPV head was inspected," whereas, as the defendants then well knew, the entire head had not been inspected during the 10th refueling outage;

C. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, as the defendants then well knew, the 10th refueling outage inspection video included head orientation narration;

D. "[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program," whereas, as the defendants then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and

E. "[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results," whereas, as the defendants then well knew, a substantial layer of boric acid remained, which would impede future inspections.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 3

The Grand Jury further charges:

On or before October 30, 2001, in the Northern District of Ohio, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2741, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

A. "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendants then well knew, significantly fewer than 65 nozzles were viewed.

B. "[i]n 1996 during 10 RFO, the entire RPV head was inspected," whereas, as the defendants then well knew, the entire reactor vessel head had not been inspected during the 10th refueling outage;

C. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, as the defendants then well knew, the 10th refueling outage inspection video included the head orientation narration;

D. "[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program," whereas, as the defendants then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and

E. "[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results," whereas, as the defendants then well knew, a substantial layer of boric acid remained, which would impede future inspections.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 4

The Grand Jury further charges:

On or before October 30, 2001, in the Northern District of Ohio, the defendants, ANDREW SIEMASZKO and DAVID GEISEN, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2744, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

A. "[i]n 1996 during 10 RFO, 100% of nozzles were inspected by visual examination," whereas, as the defendants then well knew, significantly fewer than 100 percent of the nozzles were inspected during the 10th refueling outage;

B. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated by nozzle number," whereas, as the defendants then well knew, the 10th refueling outage inspection video included head orientation narration;

C. "[t]he following pictures are representative of the head in the Spring 1996 Outage. The head was relatively clean and afforded a generally good inspection," whereas, as the defendants then well knew, the pictures were not representative, the head was not relatively clean in 1996, and a good inspection was not completed;

D. "[b]ecause of its location on the head, [a pile of boric acid] could not be removed by mechanical cleaning but was verified to not be active or wet and therefore did not pose a threat to the head from a corrosion standpoint," whereas, as the defendants then well knew, no action had been taken in 1996 to verify whether the boric acid was active or wet and, thus, not a corrosion threat;

E "these attached pictures are representative of the condition of the drives and the heads" during the inspection during the 11th refueling outage, whereas, as the defendants then well knew, the referenced pictures were not representative of that inspection; and

F. "[t]he photo for No. 19 depicts in the background the extent of boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives," whereas, as the defendants then well knew, other images

from the 2000 inspection showed that the extent of boron buildup on the head was much greater than what was depicted in the photo of nozzle number 19.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 5

The Grand Jury further charges:

On or before November 1, 2001, in the Northern District of Ohio, the defendants, RODNEY COOK, ANDREW SIEMASZKO, and DAVID GEISEN, did knowingly and willfully cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2745, that contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

"[d]uring 10RFO, in spring of 1996, the entire head was visible so 100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head," whereas, as defendants then well knew, many more than the center four nozzles were not inspected.

All in violation of Title 18 United States Code, Sections 1001 and 2.

Original document -- Signatures on file with the Clerk of Courts, pursuant to the E-Government Act of 2002.

ATTACHMENT 2

Issues for Stipulation

On August 3, 2001, the NRC issued "NRC Bulletin 2001-01: Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" requesting holders of operating licenses for pressurized water nuclear power reactors to provide information related to the structural integrity of reactor pressure vessel head penetration (RPV) nozzles, including the extent of VHP nozzle leakage and cracking, the inspections and repairs that have been undertaken to satisfy NRC regulatory requirements and the basis for concluding that plans for future inspections will ensure compliance with those requirements.

The Bulletin explained that cracked and leaking VHP nozzles had been discovered at reactors where the only indications of leakage were small boric acid deposits at the nozzle penetrations. Specifically, at the Oconee Nuclear Station Unit 3 (ONS3), reactor leakage from a cracked nozzle had resulted in a boric acid deposit of less than 1 cubic inch where the CRDM nozzle exited the RPV head. These findings raised a staff concern that visual head examinations at reactors may not find such small indications of nozzle leakage which could be indicative of circumferential cracking of the nozzles. Specifically Bulletin stated:

> . . .the presence of circumferential cracking at ONS3 where only a small amount of boric acid residue indicated a problem, calls into question the adequacy of current visual examinations for detecting either axial or circumferential cracking in VHP nozzles. This is especially significant if prior existing boric acid deposits on the RPV head mask the identification of new deposits. Also, the presence of insulation on the RPV head or other impediments may restrict an effective visual examination. As a remedial measure the RPV head may have to be cleaned at a prior outage for effective identification of new deposits from VHP nozzle cracking if new deposits cannot be discriminated from existing deposits from other sources. However, the NRC staff believes that boric acid deposits that cannot be dispositioned as coming from another source should be considered, as a conservative assumption, to be from VHP nozzles, and appropriate corrective actions may be necessary. In addition, the use of special tooling or procedures may be required to provide assurance that the visual examinations will be effective in detecting the relevant conditions.

The Bulletin further stated:

> The cracking identified at ONS2 and ONS3 reinforces the importance of conducting effective examinations of the RPV upper head area (e.g., visual under-the-insulation examinations of the penetrations for evidence of borated water leakage, or volumetric examinations of the CRDM nozzles), and using appropriate NDE methods (such as PT, UT, and eddy-current testing) to adequately characterize cracks. Because of plant-specific design characteristics, there is no uniform way to perform effective visual examinations of the RPV head at PWR facilities. Some plants have the head insulation sufficiently offset from the RPV head to permit an effective visual examination. Other plants have the insulation offset from the head but in a contour matching that of the head, requiring special tooling and procedures to perform an effective visual examination. Still other plants have insulation directly adjacent to or attached to the RPV head, potentially requiring the removal of the insulation to permit an effective visual examination. Several licensees have recently performed expanded VT-2 examinations using remote devices to inspect between the RPV head and insulation. One aspect of

> conducting effective visual examinations that is common to all PWR plants is the need to successfully distinguish boric acid deposits originating with BHP nozzle cracking from deposits that are attributable to other sources.

The Bulletin categorized plants according to their susceptibility to pressure water stress corrosion cracking (PWSCC): Low, moderate or high. Davis Besse was in the high susceptibility category.

Materiality

The NRC issued NRC Bulletin 2001-01 because of new information that raised staff concern that visual inspections would not detect evidence of circumferential cracking of RPV nozzles. The new information, indicating that visual evidence of cracking may be limited to a small amount of boric acid residue, raised the concerns that such small indications could be (1) masked by other boric acid deposits, or (2) missed in the event that insulation or other impediments restricted the visual examination of the head.

FENOC responded to the bulletin for the Davis-Besse Nuclear Power Station (DBNPS) in written submittals identified as Serial Letters 2731, 2735 and 2744, described below. Managers of DBNPS provided additional information responsive to the bulletin in a teleconference with the staff on October 3, 2001, in a briefing before the Commissioners' technical assistants on October 11, 2001, and during a meeting of the Advisory Committee on Reactor Safeguards (ACRS) meeting on November 9, 2001. The staff considered all of that information in order to determine whether regulatory action was necessary to address circumferential cracking of nozzles at the DBNPS.

Serial Letter 2731

FirstEnergy Corporation (FENOC) responded to the NRC Bulletin for the DBNPS in a submittal identified as Serial Letter 2731 on September 4, 2001. In part, Serial Letter 2731 responded to Item 1.d of the NRC Bulletin which requested:

> [A] description of the VHP nozzle and RPV head inspections (type, scope, qualification requirements, and acceptance criteria) that have been performed at your plant(s) in the past 4 years, and the findings. Include a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the RPV head for visual examinations.

FENOC's response included the following statements:

> The DBNPS has performed two inspections within the past four years, during the 11th Refueling Outage (RFO) in April 1998 and during the 12th RFO in April 2000. The scope of the visual inspection was to inspect the bare metal RPV head that was accessible through the weep holes to identify any boric acid leaks/deposits. The DBNPS also inspected 100% of Control Rod Drive Mechanism (CRDM) flanges for leaks in response to Generic Letter 88-05, "Boric Acid Corrosion of Carbon Steel Reactor Pressure Boundary Components in PWR Plants." The results of these two recent inspections are described below.

Inspections of the RPV head area performed with the RPV head insulation installed in accordance with DBNPS procedure NG-EN-00324, "Boric Acid Corrosion Control Program," which was developed in response to Generic Letter 88-05. As stated previously, a gap exists between the RPV head and the insulation, the minimum gap being at the dome center of the RPV head where it is approximately 2 inches, and does not impede visual inspection. The service structure envelopes the DBNPS RPV head and has 18 openings (weep holes) at the bottom through which inspections are performed. There are 69 CRDM nozzles that penetrate the RPV head. The metal reflective insulation is located above the head and does not interfere with the visual inspection. The visual inspection is performed by the use of a small camera. This camera is inserted through the weep holes.

. . . . . .

April 2000 Inspection Results (12 RFO)

In April 2000, Framatome Nuclear Power Services performed a 100% video inspection of CRDM flanges above the RPV insulation. Five leaking CRDM flanges were identified at locations F10, D10, C11, F8 and G9. The main source of leakage was associated with the D10 CRDM flange. Positive evidence (boron deposits on the vertical faces of the CRDM flanges and nozzle) existed that drives F8, F10 and C11 had limited gasket leakage. CRDM G9 had boron deposits under the CRDM flange between the flange and insulation, providing confidence that this leakage was associated with flange leakage. All five CRDM gaskets were replaced and the D10 CRDM flange was machined. Visual inspection of the flanges was performed. Some boric acid crystals had accumulated on the RPV head insulation beneath the leaking flanges. These deposits were cleaned (vacuumed). After cleaning the area above the insulation was videotaped for future reference.

Inspection of the RPV head/nozzles area indicated some accumulation of boric acid deposits. The boric acid deposits were located beneath the leaking flanges with clear evidence of downward flow. No visible evidence of nozzle leakage was detected. The RPV head area was cleaned with demineralized water to the greatest extent possible while maintaining the principles of As-Low-As-Reasonably-Achievable (ALARA) regarding the dose. Subsequent video inspection of the cleaned RPV head areas and nozzles was performed for future reference.

Subsequent Review of the 1998 and 2000 Inspection Videotapes Results

Since May 2001, a review of the 1998 and 2000 inspection videotapes of the RPV head has been performed. This review was conducted to re-confirm the indications of boron leakage experienced at the DBNPS were not similar to the indications seen at ONS and ANO-1; i.e., was not indicative of RPV nozzle leakage. This review determined that indications such as those that would result from RPV head penetration leakage were not evident.

Serial Letter 2731 was incomplete or inaccurate:

Serial Letter 2731's description of the amount of boric acid deposits found on the RPV head during the 12th refueling outage (12RFO) inspection conducted in 2000 was not complete and

accurate. The Serial Letter's statement that the inspection revealed indications of "some" boric acid accumulations did not accurately describe the extent of the accumulations viewed during the inspection. In fact, the 12RFO inspection revealed large accumulations of boric acid on the RPV head which precluded access to substantial portions of the RPV head, completely engulfed many nozzle penetrations and leaked out of weep holes at the bottom of the head.

Serial Letter 2731 was incomplete because it did not state that boric acid deposits impeded access to the RPV head during the 11RFO and 12RFO inspections. Boric acid deposits filled weepholes through which the inspection camera was inserted, making it impossible to view the head through those access points. Boric acid deposits also prevented access to portions of the head where it extended from the RPV head to the insulation above the head.

Serial Letter 2731 was incomplete because it failed to disclose that boric acid deposits on the RPV head made it impossible to inspect a significant number of RPV head nozzle penetrations.

Serial Letter 2731 inaccurately stated that reviews of the 1998 and 2000 inspection videotapes confirmed that there were no indications of boron leakage on the Davis Besse RPV head similar to those observed at ONS3 and ANO-1. The boron deposits observed at ONS3 and ANO-1 were small, measuring less than 1 cubic inch. At Davis Besse, the 1998 and 2000 inspection videotapes showed large accumulations of boric acid deposits which precluded access to substantial portions of the head and obscured a substantial number of the nozzle penetrations. The large accumulations of boric acid deposits would have obscured any indications of nozzle leakage such as those seen at ONS and ANO-1.

October 3, 2001, Teleconference

On October 3, 2001, representatives of FENOC (including Mr. Geisen) held a telephone conference with representatives of the NRC. The telephone conference was a follow-up to FENOC's September 4, 2001 response (Serial Letter 2731) to NRC Bulletin 2001-01. The participants discussed the condition of the RPV head during video inspections performed during 10RFO, 11RFO and 12RFO. Mr. Geisen stated that videotapes of the 10RFO, 11RFO, and 12RFO reactor pressure vessel head inspections had been reviewed. For the 12RFO, he stated that 100% of the reactor pressure vessel head had been inspected except for 5-6 nozzles on top of the RPV head where inspection was precluded because of flange leakage.

Mr. Geisen's statement that 100% of the RPV head had been inspected but for 5-6 nozzles at the top of the RPV head was inaccurate because large accumulations of boric acid deposits impeded access to large portions of the RPV head, extending well beyond the top nozzles. In fact, the boric acid deposits prevented inspection of at least 24 nozzle penetrations.

October 11, 2001, Commission Technical Assistant Briefing

On October 11, 2001, Mr. Geisen and other FENOC managers met with the NRC Commissioners' Technical Assistants (TAs) to present a safety basis to allow operation until the refueling outage scheduled for March 2002 (13RFO). During the meeting, Mr. Geisen presented slides 6 and 7, both of which described the results of inspections of the RPV head. Slide 6 stated "[c]onducted and recorded video inspection of head during 11RFO (April 1998)

and 12 RFO (April 2000) . . . No head penetration leakage was identified." Slide 7 stated "[a]ll CRDM [control rod drive mechanism] penetrations were verified to be free from "popcorn" type boron deposits using video recordings from 11RFO or 12RFO." Slide 7 also stated "[p]opcorn" type boron deposits were found to be evidence of a circumferential nozzle crack on the RPV head at the Oconee Nuclear Power Plant.

Mr. Geisen inaccurately represented that all CRDM penetrations were verified to be free from "popcorn" type deposits using video recordings from 11RFO or 12RFO. The inspection videos actually showed that boric acid deposits masked a substantial number of the CRDM penetrations, making it impossible to verify that "popcorn" type deposits were not present on those penetrations. Absent such verification, it was impossible to determine whether evidence of head penetration leakage was present.

Serial Letter 2735

FENOC provided a supplemental response to the NRC Bulletin for DBNPS in a submittal identified as Serial Letter 2735 on October 17, 2001. Serial Letter 2735 provided supplemental information regarding the results of the head inspections conducted in 1998 and 2000. In addition, the Serial Letter included information concerning the head inspection conducted in 1996 during the 10RFO to support FENOC's claim that, notwithstanding the existence of boric acid deposits on the RPV head, there would be minimal public risk if DBNPS were allowed to operate until the next refueling outage, scheduled for March 2002, when a qualified visual inspection of the RPV head would be performed. This claim was supported by a safety assessment which assumed that routine inspections would detect minor leaks well before any catastrophic failure could occur. The safety assessment concluded that these visual inspections would minimize public risk because it was highly likely that signs of CRDM nozzle or penetration weld leakage would be observed before the leakage caused CRDM nozzle structural failure or detachment.

The safety assessment, which was prepared by a contractor to FENOC, noted:

> . . . boric acid crystal buildup from flange leaks may have masked indications of CRDM nozzle leakage in the past, and may have contributed to the exterior circumferential OD cracks at the ONS not being detected by an inspection sooner.
> . . . . . .
> Over the last five to seven years, the RV head inspections have become increasingly more meaningful because of utility efforts to clean the head of boron deposits resulting from past CRDM nozzle flange leakage and other sources. A clean RV head will make new boron crystals at the nozzle penetrations more evident, and reduce the likelihood that the leakage will be missed or masked by other sources of boron on the RV head.

The Serial Letter included the following summary information regarding the inspections of the RPV head:

> In May 1996, during a refueling outage, the RPV head was inspected. No leakage was identified, and these results have been recently verified by a re-review of the video tapes obtained from that inspection. The RPV head was mechanically cleaned at the end of the outage. Subsequent inspections of the RPV head in the next two refueling outages

(1998 and 2000), also did not identify any leakage in the CRDM nozzle-to-head areas that could be inspected. Video tapes taken during these inspections have also been re-reviewed.

Accordingly, using the end of outage in 1996 as the postulated worst-case time for an axial crack to reach a through-wall condition, the projected time for the crack to reach its critical through-wall circumferential size was determined based on the results from an Framatome ANP assessment. This RV Head Nozzle and Weld Safety Assessment demonstrates the postulated crack will take approximately 7.5 years to manifest into an ASME Code allowable crack size. Applying this 7.5 years to the May 1996 inspection projects the worst-case allowable crack size being reached in November 2003. It is important to note the allowable crack size will still maintain an ASME Code safety factor of three.

. . . . . .

Based on the previous inspections conducted, re-reviewed inspection videos, analyses that have been performed concerning crack growth rates, the ability to identify cracking, and industry evaluations and findings, it is concluded there is reasonable assurance that the DBNPS will continue to operate safely to the next refueling outage scheduled for March 2002.

The Serial Letter included the following supplemental information regarding the inspections of the RPV head:

The inspections performed during the 10th, 11th, and 12 Refueling Outage (10 RFO, conducted April 8 to June 2, 1996; 11RFO, conducted April 10, to the May 23, 1998; and, 12RFO, conducted April 1 to May 18, 2000) consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid control Program pursuant to Generic Letter 88-05, “Boric Acid Corrosion of Carbon Steel Reactor Pressure Boundary Components in PWR Plants.” The visual inspections were conducted by remote camera and included below insulation inspections of the RPV bare head such that the Control rod Drive Mechanism (CRDM) nozzle penetrations were viewed. During 10RFO, 65 of 69 nozzles were viewed, during 11RFO, 50 of 69 nozzles were viewed, and during 12RFO, 45 of 69 nozzles were viewed. It should be noted that 19 of the obscured nozzles in 12 RFO were also those obscured in 11RFO. Following 11RFO, the RPV head was mechanically cleaned in localized areas as limited by the service structure design. Following 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results.

The affected areas of accumulated boric acid crystal deposits were video taped, and have subsequently been reviewed with specific focus on boric acid crystal deposits with reference to the CRDM nozzle penetration leakage as previously observed at the Oconee Nuclear Station, Unit 3 (ONS-3) and at Arkansas Nuclear One, Unit 1 (ANO-1). During the 12RFO inspection, 24 of the 69 nozzles were obscured by boric acid crystal deposits that were clearly attributable to leaking motor tube flanges from the center CRDMs. A further subsequent review of the video tapes has been conducted and corroborates the previous statements and conclusions stated in letter Serial Number 2731 that the results of this review did not identify any boric acid crystal deposits that would have been attributed to leakage from the CRDM nozzle penetrations, but were

> indicative of CRDM flange leakage. Included as Attachments 2 and 3 are the inspection results for 10RFO, 11RFO and 12RFO, and a figure representing these nozzle locations, respectively.

A table attached to Serial Letter 2735 depicted the inspection findings from 1996, 1998 and 2000. The findings were identified as (1) flange leak evident, (2) no leak observed, meaning the visual inspection was satisfactory and no video record was required, or (3) no leak recorded, meaning that nozzle inspection was recorded on videotape. For the 1996 inspection, no findings were reported on the table. A footnote to the table stated the following:

> In 1996 during 10RFO, the entire RPV head was inspected. Since the video was void of head orientation narration, each specific nozzle view could not be correlated.

Also attached to Serial Letter 2735 were head maps on which the 11 and 12RFO inspection findings were depicted. The head maps identified the following information for each nozzle for the 11RFO inspection, the 12 RFO inspection, and the 11RFO & 12RFO inspections combined:

(1) No leakage identified
(2) Evaluated not to have sufficient gap to exhibit leakage
(3) Insufficient gap with leaking flange
(4) Nozzle obscured by boron
(5) Nozzle obscured by boron with leaking flange
(6) Newly affected, since 11RFO, by leaking flange(s)

The head map for 11RFO labeled 50 of the 69 nozzles “no leakage identified.” The remaining 19 nozzles - labeled (2) through (5) - were clustered in the southeastern portion of the head. The head map for 12RFO labeled 45 of the 69 nozzles as “no leakage identified.” The remaining 24 nozzles – labeled (2) through (5) - included the same nozzles with those labels for 11RFO and 5 additional nozzles located in the southeastern portion of the head.

The head maps for 11RFO and 12RFO labeled five nozzles on the southeastern portion of the head to be (3) or (6), “with leaking flange.”

<u>Serial Letter 2735 was incomplete and inaccurate</u>:

Serial Letter 2735 inaccurately and/or incompletely reported the results of nozzle inspections during the 10, 11 and 12RFO inspections in the following respects:

- Serial Letter 2735 incorrectly reported that the 10RFO inspection showed no indications of nozzle leakage for 65 of 69 nozzles. However, significantly fewer nozzle penetrations were viewed during that inspection.
- Serial Letter 2735 incorrectly reported that the 11RFO inspection showed no indications of nozzle leakage for 50 of 69 nozzles. However, significantly fewer nozzle penetrations were viewed during that inspection.
- Serial Letter 2735 incorrectly reported that the 12RFO inspection showed no indications of nozzle leakage for 45 of 69 nozzles. However, significantly fewer nozzle penetrations were viewed during that inspection.

Serial Letter 2735 stated that a review of the video tapes from 11RFO and 12RFO inspections

corroborated the conclusion in Serial Letter 2731 that no boric acid crystal deposits indicative of CRDM nozzle leakage were present. However, boric acid deposits precluded access to substantial portions of the head and obscured many of the nozzle penetrations, making it impossible to determine whether boric acid deposits indicative of nozzle leakage were present. These deposits would obscure any boric acid deposits characteristic of nozzle leakage, making it impossible to determine whether boric acid deposits indicative of nozzle leakage were present.

Serial Letter 2744

FENOC provided another supplemental response to the NRC Bulletin 2001-01 on October 30, 2001 (Serial Letter 2744). Serial Letter 2744 provided the following supplemental information regarding the inspections of the RPV head:

> The inspections performed during the 10th, 11th, and 12th Refueling Outage (10RFO, conducted April 8 to June 2, 1996; 11RFO, conducted April 10, to May 23, 1998; and, 12RFO, conducted April 1 to May 18, 2000) consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Corrosion Control Program pursuant to Generic Letter 88-05, "Boric Acid Corrosion of Carbon Steel Reactor Pressure Boundary Components in PWR Plants." The visual inspections were conducted by remote camera and included below insulation inspections of the RPV bare head such that the Control Rod Drive Mechanism (CRDM) nozzle penetrations were viewed. During 10RFO, 65 of 69 nozzles were viewed, during 11RFO, 50 of 69 nozzles were viewed, and during 12RFO, 45 of 69 nozzles were viewed. It should be noted that 19 of the obscured nozzles in 12RFO were also those obscured in 11RFO. Following 11RFO, the RPV head was mechanically cleaned in localized areas as limited by the service structure design. Following 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results.
>
> The affected areas of accumulated boric acid crystal deposits were video taped, and have subsequently been reviewed with specific focus on boric acid crystal deposits with reference to the CRDM nozzle penetration leakage as previously observed at the Oconee Nuclear Station, Unit 3 (ONS-3) and at Arkansas Nuclear One, Unit 1 (ANO-1). During the 12RFO inspection, 24 of the 69 nozzles were obscured by boric acid crystal deposits that were clearly attributable to leaking motor tube flanges from the center CRDMs. A further subsequent review of the video tapes has been conducted and the results of this review did not identify any boric acid crystal deposits that would have been attributed to leakage from the CRDM nozzle penetrations, but were indicative of CRDM flange leakage.

Attached to Serial Letter 2744 was a copy of the nozzle table submitted as an attachment to Serial Letter 2735 on which footnote 1 had been revised. On the table submitted with Serial Letter 2744 the footnote read:

> In 1996 during 10 RFO, 100% of nozzles were inspected by visual examination. Since the video was void of head orientation narration, each specific nozzle view could not be

correlated by nozzle number. Nozzles 1, 2 3, and 4 which do not have sufficient interference gap were excluded. The remaining 65 nozzles did not show any evidence of leakage.

Also attached to Serial Letter 2744 were head maps depicting the results of the 11 and 12RFO inspections submitted with Serial Letter 2735. Also submitted with Serial Letter 2744, under attachments labeled "Spring 1996 Inspection," "Spring 1998 Inspection," and "Spring 2000 Inspection," were pictures of the RPV head obtained from the videotape inspections.
The Spring 1996 inspection attachment included:

- Photographs depicting boric acid deposits on the RPV head
- A caption that stated "Some boron piles were observed at the top of the head in the vicinity of previous leaking flanges. Because of its location on the head, it could not be removed by mechanical cleaning but was verified to not be active or wet and therefore did not pose a threat to the head from corrosion standpoint. Additionally, since these drives are not credited with leaking, that further ratifies that the boron is from previous flange leakage. The boron was heaviest beneath the mirror insulation seams.
- A caption that stated "[b]ecause of its location on the head, [a pile of boric acid] could not be removed by mechanical cleaning but was verified to not be active or wet and therefore did not pose a threat to the head from a corrosion standpoint."

The Spring 1998 inspection attachment included:

- Photographs depicting boric acid deposits on the RPV head.
- A caption stating "[a]lthough much more video can be viewed, these attached pictures are representative of the condition of the drives and the heads."

The Spring 2000 inspection attachment included:

- Photographs depicting boric acid deposits on the RPV head.
- A caption stating "[t]he photo for No. 19 depicts in the background the extent of boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives."

<u>The information submitted in Serial Letter 2744 was inaccurate and incomplete</u>:

Serial Letter 2744 incorrectly reported that:

- 65 of 69 nozzles were viewed during 10 RFO. In fact, significantly fewer nozzles were viewed
- 50 of 69 nozzles were viewed during 11 RFO. In fact, significantly fewer nozzles were viewed
- 45 of 69 nozzles were viewed during 12 RFO. In fact, significantly fewer nozzles were viewed.

Serial Letter 2744 inaccurately stated that the video tapes from the 1998 and 2000 inspections did not show any boric acid crystal deposits from CRDM nozzle penetration leakage. The video tapes showed extensive boric acid deposits which obscured substantial portions of the RPV head and many of the nozzle penetrations. These deposits would obscure any boric acid deposits characteristic of nozzle leakage, making it impossible to determine whether boric acid deposits indicative of nozzle leakage were present.

Serial Letter 2744 inaccurately stated that (1) the photographs for the 1996 inspection (10RFO)

were representative of the condition of the RPV head at the time and (2) "[t]he head was relatively clean and afforded a generally good inspection." In fact, the head was not relatively clean in 1996 and a good inspection was not completed. The photographs depicted only small boric acid deposits and failed to show the much larger boric acid deposits found during the inspection.

Serial Letter 2744 misrepresented the condition of the RPV head by including only photographs showing small amounts of boric acid deposits and omitting photographs showing larger boric acid deposits from the RPV inspection videotapes.

Serial Letter 2744 inaccurately stated that the photographs for the 1998 inspection (11RFO) were representative of the condition of the RPV head. In fact, the photographs depicted only small boric acid deposits and failed to show the much larger boric acid deposits found during the inspection.

Serial Letter 2744 stated that the photograph for nozzle 19 from the 2000 inspection (11RFO) showed the extent of boric buildup on the head. However, the inspection videotape showed that the boric acid buildup was much greater than that shown in photograph 19.

The table submitted with Serial Letter 2744 inaccurately stated that during 10RFO 100% of the nozzles were inspected by visual examination when extensive deposits of boric acid prevented inspection of nearly half of the nozzles during that outage.

The table submitted with Serial Letter 2744 inaccurately stated that the 1996 inspection video was void of head orientation making it impossible to determine nozzle numbers. In fact, the video recording contained head orientation narration which permitted nozzle identification.

The table submitted with Serial Letter 2744 inaccurately stated that 65 of the nozzles (excluding nozzles 1, 2, 3 and 4) did not show any evidence of leakage. In fact, extensive boron deposits on the RPV head obscured substantial portions of the head and many nozzle head penetrations, making it impossible to determine whether the small popcorn types of deposits associated with nozzle leakage were present on a substantial number of those 65 nozzles.

November 9, 2001 ACRS Meeting

On November 9, 2001, Mr. Geisen and other FENOC managers presented information on circumferential cracking of the Davis Besse RPV head nozzles at an Advisory Committee on Reactor Safeguards (ACRS) meeting. The presentation provided FENOC's justification for continued operation until the refueling outage scheduled for March 2002. In response to a question on the extent of the 1998 and 2000 inspections, Mr. Geisen stated:

> I'll talk to that. What we did is recognize - - this is Dave Geisen. With regard to these inspections, recognize that they were not done looking for this particular phenomenon. They were looking for other things. The two inspections done in 1998 and 2000 were really looking for the impact of boric acid leakage from leaky flanges that we had subsequently repaired and what was the impact to that. So the view we got from those was in many cases some of the drives you couldn't event get a good view of. There were many cases, the camera angle was looking upwards because it was looking at the structural material of the service structure on top of the head.

When we looked at a 1996 data, you got more of a downward look at these nozzles because we were specifically following around a vacuum and probe that was looking for head wastage as result of the boron being deposited on head. So what really comes down to it, the best video we have on this goes all the way back to 1996.

ATTACHMENT 3

COUNT IN INDICTMENT	INDICTMENT STATEMENT	STIPULATIONS
Count 3 – Serial Letter 2741[1] "On or before October 30, 2001 . . . David Geisen . . . did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2741, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:"	A. "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendant[] well knew, significantly fewer than 65 nozzles were viewed.	65 of 69 nozzles were viewed during 10 RFO. In fact, less than half of the nozzles were viewed.
	D. "[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program," whereas, as the defendant[] then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken.	Serial Letter 2744 inaccurately reported that the inspections performed during the 10, 11 and 12RFOs consisted of a whole head visual inspection of the RPV. In fact, boric acid deposits on the RPV prevented a whole head visual inspection in any of those inspections.
Count 4 – Serial Letter 2744 "On or before October 30, 2001 . . . David Geisen . . . did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2744, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:"	A. "[i]n 1996, during 10RFO, 100% of nozzles were inspected by visual examination," whereas as the defendants well knew, significantly fewer than 100% of the nozzles were inspected during 10RFO.	The table submitted with Serial Letter 2744 inaccurately stated that during 10RFO 100% of the nozzles were inspected by visual examination when extensive deposits of boric acid prevented inspection of nearly half of the nozzles during that outage.
	B. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, as the defendants well knew, the 10th RFO inspection video included head orientation narration.	The table submitted with Serial Letter 2744 inaccurately stated that the 1996 inspection video was void of head orientation making it impossible to determine nozzle numbers. In fact, the video recording contained head orientation narration which permitted nozzle identification.
	C. "[t]he following pictures are representative of the head in the Spring 1996 Outage. The head was relatively clean and afforded a generally good inspection," whereas as the defendants then well knew, the pictures were not representative, the head was not relatively clean in 1996, and a good inspection was not completed.[2]	Serial Letter 2744 inaccurately stated that (1) the photographs for the 1996 inspection (10RFO) were representative of the condition of the RPV head at the time and (2) "[t]he head was relatively clean and afforded a generally good inspection." In fact, the head was not relatively clean in 1996 and a good inspection was not completed. The photographs depicted only small boric acid deposits and failed to show the much larger boric acid deposits found during the inspection.
	E. "these attached pictures are representative of the condition of the drives and the heads" during the inspection during 11RFO, whereas, as the defendants well knew, the referenced pictures were not representative of that inspection.[3]	Serial Letter 2744 inaccurately stated that the photographs for the 1998 inspection (11RFO) were representative of the condition of the RPV head. In fact, the photographs depicted only small boric acid deposits and failed to show the much larger boric acid deposits found during the inspection.

	F. "[t]he photo for No. 19 depicts in the background the extent of boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives," whereas, as the defendants then well knew, other images from the 2000 inspection showed that the extent of boron buildup on the head was much greater than what was depicted in the photo of nozzle number 19.[4]	Serial Letter 2744 stated that the photograph for nozzle 19 from the 2000 inspection (11RFO) showed the extent of boric buildup on the head. However, the inspection videotape showed that the boric acid buildup was much greater than that shown in photograph 19.

[1] Certain statements that were presented in Serial Letter 2741 were identical to those presented in Serial Letter 2744. Considering both were submitted on October 30, 2001, it is reasonable to apply collateral estoppel to the jury's guilty verdict on Count 3, Serial Letter 2735, and find that Mr. Geisen is estopped from denying that he knowingly provided those materially false statements to the NRC in Serial Letter 2744.

[2] *See also* "Manner and Means of Scheme" number 10 from Count 1, of which Mr. Geisen was also found guilty, that "[o]n or about October 30, 2001 . . . David Geisen . . . caused Serial Letter Number 2744 to be forwarded to the NRC. This submission included photographs taken from the videotapes of the inspections of the reactor vessel head, indicating that the photographs were 'representative' of the condition of the reactor vessel head, but which omitted portions of the videos showing substantial deposits of boric acid." Indictment at 9.

[3] *Id.*

[4] *Id.*

ATTACHMENT 4

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

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 3:06 CR 712

-vs-

O R D E R

DAVID GEISEN, et al.,

Defendant.

KATZ, J.

Pending before the Court is Defendant Geisen's motion for judgment of acquittal (Doc. No. 250) or, in the alternative, for a new trial which motion was filed on November 28, 2008. Also before the Court are the government's memorandum in opposition and Defendant's reply thereto. On March 20, 2008, the Court heard oral argument on the motion and the issues are ripe for adjudication.

A. Legal Standards Under Fed. Crim. Rules 29 and 33

In determining whether the evidence upon which the jury based its decision is sufficient to survive a Rule 29 challenge, this Court is directed by the case law to view the evidence and all reasonable inferences therefrom in a light most favorable to the Government. *United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992). A verdict should be upheld if, ". . . any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virgina*, 443 U. S. 307, 319 (1997); *United States v. Acosta-Casares*, 878 F.2d 945, 952 (6th Cir.), *cert. denied*, 493 U.S. 899 (1989).

The burden under Rule 33 of the Federal Rules of Criminal Procedure is upon the defendant attacking a jury verdict; that verdict is presumptively valid. *United States v. Turner*, 490 F.Supp. 583 (E. D. Mich. 1979). However, the trial court may overturn the jury's verdict

where the evidence preponderates heavily against the verdict tantamount to a miscarriage of justice. *United States v. Pierce,* 62 F.3d 818, 825-826 (6th Cir. 1995).

B. Discussion

As noted at the outset of the oral argument, this Court reiterates the issue, under Rule 29, is whether there is sufficient evidence from which a reasonable jury, deliberating with the guidance of proper instructions, could have determined guilt beyond a reasonable doubt, not beyond *all* doubt. Counsel for both sides have been zealous advocates for their clients and the Court lauds their professionalism.

The Court has reviewed the memoranda filed by the parties and reviewed the transcript of the oral argument, giving due consideration to both sides' arguments. Distilled to its essence, the Defendant argues the government did not present evidence of knowledge of falsity with the intent to deceive. This Court does not agree.

Although a close case, the evidence presented, including testimony from the Defendant himself, when viewed cumulatively, constitutes sufficient direct and circumstantial evidence upon which a reasonable jury, utilizing the standard "beyond a reasonable doubt", could have based a finding of knowledge and intent.

The Defendant's arguments regarding inconsistent verdicts are also unavailing as inconsistent verdicts do not necessarily mandate an acquittal. *United States v. Powell,* 469 U.S. 57 (1984). A comparison of the jury's acquittal of Mr. Cook as contrasted with the Defendant requires the Court to circumvent the jury's determinations regarding credibility and weight of the evidence, an improper role for the reviewing court. *United States v. Evans,* 883 F.2d 496, 501 (6th Cir. 1989).

With respect to the Defendant's motion for new trial under Rule 33, the gravamen of the argument is that the Court erred in giving the "deliberate ignorance" instruction, thus misleading the jury. The pattern instruction, given with some small additional direction to the jury, has been approved in multiple cases cited by the Government at page 32 of its memorandum. The Circuit has repeatedly held that the instruction is harmless error where sufficient evidence of actual knowledge was present. This is the case here. The jury, as in many cases involving state of mind or intent or knowledge, had before it facts from which it could reasonably conclude that Geisen knowingly included or omitted information or statements which thus misled the NRC. Finally, the Court does not find the verdict is against the manifest weight of the evidence so as to amount to a miscarriage of justice.

This Court has not exhaustively written herein on the issues raised by Defendant and addressed by the Government in approximately 100 typed pages of briefing and two hours of oral argument. It is the conclusion of this Court that the Government's reasoning and conclusions warrant denying Defendant's motion under consideration.

For the foregoing reasons, the Defendant's motion for acquittal pursuant to Rule 29 and for a new trial pursuant to Rule 33 (Doc. No. 250) is DENIED.

IT IS SO ORDERED.

S/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	ASLBP No. 06-845-01-EA
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR COLLATERAL ESTOPPEL" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 17th day of November, 2008.

Michael C. Farrar * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: Mike.Farrar@nrc.gov

Nicholas G. Trikouros * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: Nicholas.Trikouros@nrc.gov

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G4
Washington, D.C. 20555
E-mail: Hearing.Docket@nrc.gov

E. Roy Hawkens * **
Chief Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: Roy.Hawkens@nrc.gov

Office of Commission
Appellate Adjudication * **
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G4
Washington, D.C. 20555
Email: OCAAMAIL.Resource@nrc.gov

Richard A. Hibey, Esq. **
Charles F.B. McAleer, Jr., Esq.
Andrew T. Wise, Esq.
Mathew T. Reinhard, Esq.
Miller & Chevalier
655 Fifteenth Street, N.W., Suite 900
Washington, D.C. 20005-5701
E-mail: rhibey@milchev.com
awise@milchev.com
mreinhard@milchev.com

Johanna Thibault * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: Johanna.Thibault@nrc.gov

Libby Perch * **
Board Staff
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: Libby.Perch@nrc.gov

/RA/

_____
Kimberly A. Sexton
Counsel for the NRC Staff