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NUCLEAR REGULATORY COMMISSION

Title: Pre-Hearing Conference
ITMO David Geisen

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

Location: (telephone conference)

Date: Tuesday, November 25, 2008

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Pages 735-756

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UNITED STATES OF AMERICA

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NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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PRE-HEARING CONFERENCE

In the Matter of: || Docket No. IA-050-052

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

Tuesday, November 25, 2008

The above-entitled conference was
convened, pursuant to notice, at 3:30 p.m.

BEFORE:

MICHAEL C. FARRAR, Administrative Judge, Chair

E. ROY HAWKENS, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

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1 APPEARANCES:

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

(3:31 p.m.)

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2
3 CHAIRMAN FARRAR: This is Mike Farrar, the
4 Chairman of the Geisen Licensing Board. At the
5 request of the staff, we have assembled this
6 afternoon, in somewhat hurried fashion, to respond to
7 their request for certain relief or at least for an
8 immediate ruling as to that relief.

9 I am off site. Judge Trikouros is off
10 site. Judge Hawkens is at headquarters. Mr. Wise,
11 you are there?

12 MR. WISE: Yes, I am.

13 CHAIRMAN FARRAR: And Ms. Clark for the
14 staff?

15 MS. CLARK: Yes, Your Honor. And I am
16 here with Kimberly Sexton, Shahram Ghasemian, and
17 Catherine Marco.

18 CHAIRMAN FARRAR: All right. The usual
19 suspects.

20 MS. CLARK: Yes.

21 CHAIRMAN FARRAR: Mr. Wise, are you by
22 yourself?

23 MR. WISE: Your Honor, I am feeling
24 awfully lonely. I am by myself.

25 CHAIRMAN FARRAR: Okay.

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1 MR. WISE: Mr. Hibey is in court down in
2 Florida.

3 CHAIRMAN FARRAR: All right. Thank you
4 for joining in on short notice.

5 Ms. Clark, I have not actually seen your
6 e-mail. Do you want to give us the 30-second version
7 of what you are asking for?

8 JUDGE HAWKENS: Ms. Clark, I'm sorry to
9 interrupt, but I thought I heard somebody just come on
10 to the conference line. And I want to inquire, did
11 somebody just come on?

12 (No response.)

13 JUDGE HAWKENS: Apparently not. Sorry.
14 Go ahead, Judge Farrar.

15 CHAIRMAN FARRAR: Nick, are you still
16 there?

17 MR. WISE: I am here.

18 CHAIRMAN FARRAR: Yes. Okay. Go ahead,
19 Ms. Clark, a very short version. For your
20 information, the Board has had a little conference
21 call among itself prior to this. So I think we're
22 apprised of what you want, but if you would just
23 restate it briefly?

24 MS. CLARK: Thank you. I want to first
25 thank Your Honors for being available on such short

1 notice. The issue is that we would like to admit as
2 an exhibit in this case the transcript of John
3 Martin's testimony in the criminal trial.

4 Mr. Martin is currently located in
5 California. And we would expect that if we were to
6 bring him here, we would essentially examine him on
7 the exact same matters that he addressed in the
8 criminal trial.

9 At the criminal trial, Mr. Wise had the
10 opportunity to cross-examine Mr. Martin. And so in
11 the interest of saving resources and time, we would
12 ask that the Board allow us to admit this into the
13 enforcement hearing.

14 CHAIRMAN FARRAR: All right. Thank you.

15 Mr. Wise, I take it we wouldn't be here if
16 you didn't have an objection.

17 MR. WISE: Right. I think that is right,
18 Your Honor. And this is where we are. There is
19 testimony of a number of witnesses that the Board is
20 going to receive in evidence from the criminal trial
21 without objection from us. And the objection, of
22 course, would be that it would be hearsay.

23 In many cases where the substance of the
24 transcript conveys a full picture of the witness, we
25 are not objecting. So, for example, the Board is

1 going to receive the testimony of Steven Moffitt,
2 which is one example that comes to mind.

3 Mr. Martin to us is a different situation.
4 And the reason is this. He did testify at the
5 criminal trial. He was cross-examined at the criminal
6 trial.

7 It is our strong view that an important
8 part of evaluating the credibility of what Mr. Martin
9 says is evaluating his demeanor and hearing from him
10 live. And I can tell you that that is born out of our
11 observations of him and our conversations with the
12 jurors who watched him. He is, I believe, the rare
13 circumstance where in order to really have a full
14 picture and be able to determine whether to credit
15 what he says, the Board needs to see him.

16 And I do think that he is a fairly
17 critical part of the staff's case. My expectation
18 based upon the staff's collateral estoppel pleading is
19 that they are going to ask you to take his testimony
20 as establishing that Mr. Geisen said something that is
21 recorded in a half page of notes that was typed from
22 Mr. Martin's handwritten notes, which we believe the
23 evidence strongly shows is inaccurate.

24 But if the staff is offering it to support
25 that argument that Mr. Geisen said it, in order to

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1 really evaluate whether you credit his testimony, I
2 think this is one of the witnesses that the Board
3 really needs to see. And that's why we object to
4 proceeding this time.

5 CHAIRMAN FARRAR: Let me interrupt you for
6 a second.

7 MR. WISE: Yes.

8 CHAIRMAN FARRAR: Is Mr. Geisen going to
9 testify in front of us?

10 MR. WISE: He is.

11 CHAIRMAN FARRAR: And he will deny
12 whatever this is? He will deny that he said it?

13 MR. WISE: Yes.

14 CHAIRMAN FARRAR: Okay. Ms. Clark, what
15 do you do with these arguments that, one, this is
16 critical and -- well, three arguments. One, it's
17 critical to the case; two, the demeanor is important;
18 and, three, that the opposition has agreed as to other
19 witnesses and that this is a special case for them?

20 MS. CLARK: Well, we agree that this
21 testimony is important in this case. As far as the
22 other witnesses, it does not appear to me that there
23 is any -- that Mr. Martin's testimony should be
24 treated any differently than the other testimony that
25 we will be placing into the evidence.

1 I happened to be at the criminal trial and
2 observe Mr. Martin testify. For what it's worth, my
3 observation was that he was a very credible witness.
4 His testimony, as you will see, is very
5 straightforward. And there was certainly nothing
6 unique about his demeanor during the criminal trial
7 that, to my observation, would cause the jurors to
8 question his credibility.

9 I believe that he was fully
10 cross-examined. Mr. Wise was able to fully develop
11 any questions that he had about the validity of Mr.
12 Martin's notes. And so our belief is that this should
13 be admitted.

14 CHAIRMAN FARRAR: All right. We allegedly
15 have a system here where the Board members -- Nick or
16 Roy, did you want to ask a question before we caucus?

17 JUDGE HAWKENS: No.

18 JUDGE TRIKOUROS: No, I don't think so.

19 CHAIRMAN FARRAR: Okay. Then if the
20 parties would --

21 JUDGE HAWKENS: If the parties could just
22 stand by? Judge Farrar, I will put them on mute.

23 CHAIRMAN FARRAR: Okay. We will be back
24 to you shortly.

25 (Whereupon, the foregoing matter went off

1 the record at 3:39 p.m. and went back on the record at
2 3:41 p.m.)

3 CHAIRMAN FARRAR: The Board has caucused.
4 And our view on this is if there is any evidence that
5 the parties agreed be before us straight from the
6 criminal case, that is fine. But if either party
7 makes an argument that it is important to them that we
8 see the witness live, we favor that position.

9 So without saying that we agree with Mr.
10 Wise that the things he thinks we will draw from the
11 demeanor evidence are true, in our mind, as the staff
12 would be in the opposite circumstance, he is entitled
13 to try to put that claim in front of us. So we will
14 deny the staff's motion for having an exhibit in of
15 Mr. Martin's testimony.

16 And Judge Hawkens is available in the
17 office. I think your alternative relief was that we
18 immediately issue you a subpoena so that you can get
19 him here. so Judge Hawkens is available. And I'll
20 leave it after we get off the phone for you all, for
21 the staff to talk to him about.

22 I guess, just like you did with that other
23 witness, e-mail the subpoena. And he will sign it,
24 and you can pick it up.

25 MS. CLARK: Very well. Thank you.

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1 CHAIRMAN FARRAR: Don't go. As long as we
2 have you here, it turns out to be convenient to ask
3 you some other things to make sure we're on target for
4 the trial.

5 Mr. Wise, you are going to file your
6 response to the collateral estoppel motion by tomorrow
7 evening?

8 MR. WISE: Yes.

9 CHAIRMAN FARRAR: Okay. And I believe Mr.
10 Geisen has filed a motion concerning the standard of
11 proof in the last day or so?

12 MR. WISE: That is right.

13 CHAIRMAN FARRAR: Does the staff agree
14 with that motion?

15 MS. CLARK: No, Your Honor. And I expect
16 that we will be filing our response tomorrow.

17 CHAIRMAN FARRAR: Tomorrow? Okay.
18 Excellent. Response on Wednesday. Let's take those
19 two things separately; first, the standard of proof.
20 Is that something that the parties need an immediate
21 ruling on? By "immediate" I mean next Monday.
22 Because suppose we were to agree with Mr. Geisen.

23 Then the staff might say, "Gee, we thought
24 we had a preponderance, but we better add one or two
25 witnesses" or is that something we can hold to the end

1 of the case?

2 MS. CLARK: Your Honor, you have
3 anticipated the staff's concern. We have prepared our
4 case. Under the understanding that we would have to
5 demonstrate proof by a preponderance of the evidence,
6 if the burden were now to be changed at this late
7 date, we would need to reconsider our case.

8 CHAIRMAN FARRAR: Okay. Then if you will
9 get your response in by Wednesday night, we will have
10 a ruling for you by Monday morning.

11 MS. CLARK: Thank you, Your Honor.

12 CHAIRMAN FARRAR: Okay. It may not be an
13 order. It just may be an e-mail to both sides.

14 Collateral estoppel. Without having seen
15 the -- oh, the staff's motion, that brief did a very
16 good job of covering the points, but it left open at
17 the end, if I remember correctly, exactly what kind of
18 ruling you wanted.

19 Do you all need a ruling on that by next
20 Monday or is that something -- we had once talked
21 about holding that ruling until the very end of the
22 case.

23 MS. CLARK: Well, I believe the ruling we
24 would be seeking is to estop Mr. Geisen from denying
25 that he was culpable for the statements regarding

1 serial letter 2744 that are identified in the criminal
2 indictment.

3 CHAIRMAN FARRAR: Okay. If you don't get
4 that ruling in advance, you're prepared to make that
5 case?

6 MS. CLARK: Yes, we are.

7 CHAIRMAN FARRAR: I would say why don't
8 you continue to prepare to make that case because we
9 may not be prepared to make that ruling in advance of
10 the case.

11 MS. CLARK: Very well.

12 CHAIRMAN FARRAR: So unless it is clear to
13 us that -- and I can't speak for my colleagues, and
14 right now I don't want to take the time to caucus, but
15 I would think that unless it is very clear to us that
16 you are absolutely certain almost that you are
17 entitled to that ruling, we would prefer that you go
18 ahead and put the evidence on. And then if we later
19 say, "Gee, you didn't need to put on the evidence
20 because you want collateral estoppel," that is fine.

21 We don't have to -- whereas, with the
22 other, if we decide we make a case on collateral
23 estoppel, we would have to reconvene the hearing. So
24 I think our bias would be toward you continuing to be
25 prepared. But we will give you that other ruling by

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1 Monday morning. Now --

2 MR. WISE: Your Honor, could I just say so
3 that we're all clear on what the Board is going to get
4 tomorrow, our view coming out of the conference call
5 was that the purpose of these briefs was to give the
6 general principles of where the parties stood on that.

7 Part of our pleading that I believe the
8 Board is going to see tomorrow is a suggestion that
9 the proper course given the way this issue plays out
10 is for the Board to consider it after the hearing.

11 And so I would hope that we would adhere
12 to the approach that the Board articulated on the
13 conference call, which what I think I'm hearing is the
14 likely procedure.

15 MS. CLARK: Your Honor, this is Lisa
16 Clark. I just want to clarify. It's our belief that
17 we are entitled to collateral estoppel as a matter of
18 law and that that ruling can issue, regardless of what
19 is presented at the hearing.

20 MR. WISE: Well, I think there are two
21 fairly significant flaws in the staff's argument that
22 we will lay out in the pleading tomorrow. And I think
23 that it will come into focus once we file our pleading
24 tomorrow.

25 CHAIRMAN FARRAR: Okay. And, Ms. Clark,

1 let me assure you that the Board is not unsympathetic
2 to your claim. If you recall, I think we raised it a
3 long time ago that, you know, isn't this an issue.
4 And now we are at the point of, okay, how do we deal
5 with it.

6 But I would say for now let's proceed as
7 though you're not certain you will get a favorable
8 ruling. So you can win the case by a favorable ruling
9 or by putting on evidence of your own. So let's
10 proceed that way, you know, for now.

11 Let me ask you. The staff, as I
12 understand the law, has the ultimate burden of
13 persuasion on these. But have you decided who is
14 going first, what the best way to logistically handle
15 the trial is.

16 MR. WISE: Your Honor, Mr. Ghasemian and
17 I spoke about this on Friday night. And I don't think
18 -- he will correct me if I misspeak. I don't think we
19 have reached any final conclusions on that, but I
20 think it was our shared sense that it probably made
21 sense to proceed as the normal case would in that the
22 staff would put their case on first.

23 The only witness we intend to call is Mr.
24 Geisen. We will put Mr. Geisen on. I think it will
25 be fairly tidy in that respect if it proceeds that

1 way. I think that is probably what we expect at this
2 point.

3 CHAIRMAN FARRAR: The concern we had
4 talking among the Board members last week was the
5 staff has a large case. And they can go ahead and put
6 on their whole case, but it might simplify things if
7 they knew exactly what elements of it were under
8 attack so they wouldn't prove things they didn't need
9 to prove.

10 But, Ms. Clark, do you feel you have a
11 sense from the -- well, did you all take Mr. Geisen's
12 deposition?

13 MS. CLARK: Yes, we did.

14 CHAIRMAN FARRAR: Do you have a sense from
15 the deposition and from all the other preparations
16 that you won't be engaging in overkill in terms of
17 putting your case on first?

18 MS. CLARK: I don't believe so. And the
19 fact that we have come to agreement on a number of
20 stipulations will also serve to narrow the issues that
21 we need to present. So I actually agree that that
22 might be best for us to present our case first.

23 And, again, my understanding from a
24 conversation a while ago with Andy -- please correct
25 me if I am wrong, Andy -- is that when they present

1 Mr. Geisen as a witness, that we would not be limited
2 in the scope of our cross-examination to the extent
3 that we want to ask him additional questions as well.

4 MR. WISE: I think that is right.

5 CHAIRMAN FARRAR: Yes. That makes sense
6 to us, I think. All right. Then let me check here
7 and see if there is anything else.

8 MR. WISE: Did you want to, Judge Farrar,
9 talk about the timing of a conference on the 4th?

10 CHAIRMAN FARRAR: Oh, yes. And we may
11 only need five minutes, but you all have a lot of
12 documents coming in next Wednesday, the 3rd. Let's
13 reserve 4:00 p.m. on Thursday, the 4th for a
14 conference call in case there is anything that has to
15 be resolved at that point. Ms. Clark, can you all be
16 available?

17 MS. CLARK: Why don't you go ahead?
18 Excuse me, Judge Farrar. Mr. Ghasdhamian wanted to
19 mention something about the way we are going to
20 present the case using your equipment.

21 MR. GHASEMIAN: Yes, Your Honor. This is
22 Shahram Ghasemian. I have also talked to Mr. Wise
23 briefly about this issue.

24 We hope to use the system that is
25 available at the hearing room. I believe it's called

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1 the DDMS system. And I talked to Mr. Wise and
2 informed him that we hoped to do that. And he didn't
3 have any objections for the staff to use the
4 electronic system to display our exhibits and so on.

5 And I just wanted to bring that up to your
6 attention to see whether you have any thoughts or
7 rulings on that, whether you would prefer that or not.

8 CHAIRMAN FARRAR: No. We prefer whatever
9 gets the material in front of us in the fashion the
10 parties believe best. So if you have consulted with
11 Mr. Wise and that is the way you want to do it, we are
12 happy to have it that way. And we are happy to have
13 the evidence from the other side in whatever form they
14 want to do it.

15 JUDGE HAWKENS: This is Judge Hawkens.
16 And we had actually planned on giving the DDMS system
17 a trial run. So I am delighted that you all are on
18 board with that.

19 We will have a court clerk there. And you
20 are providing your exhibits ahead of time in
21 electronic form. We were just going to load that onto
22 the DDMS system. So to the extent during the course
23 of the evidentiary hearing a party in the presentation
24 of its case wants to put something on the screen, they
25 can simply ask the court clerk to pull up the exhibit,

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1 go to a particular page, and it can be put on the
2 screen. So we're looking forward to using that
3 system.

4 MR. WISE: Your Honor, I can tell you I'm
5 breaking out in hives with all this talk of
6 technology, but we will give it our best as well.

7 CHAIRMAN FARRAR: Good. You can do it all
8 the old-fashioned way.

9 MR. GHASEMIAN: Your Honors, one other
10 thought. We do plan on having hard copies of our
11 exhibits. And we're going to give a separate set to
12 all the members of the Board and the clerk and the
13 reporter and Mr. Geisen's counsel as a backup just in
14 case there is a glitch in the electronic system. So
15 we will have hard copies and hope to use the DDMS.

16 CHAIRMAN FARRAR: Well, remember, I think
17 that order that was put out a week or so ago said how
18 many copies we want --

19 MR. WISE: Yes.

20 CHAIRMAN FARRAR: -- in advance, courtesy
21 copies, and then don't duplicate that. I think we
22 have put out whatever number is supposed to have that
23 rubber stamp. Did you get the stamp, Mr. Wise?

24 MR. WISE: Yes. Thank you.

25 CHAIRMAN FARRAR: The staff got theirs?

1 MR. GHASEMIAN: Yes, Your Honor.

2 CHAIRMAN FARRAR: Yes. So at the actual
3 hearing, if we have gotten courtesy copies in advance,
4 we will work with those. So don't give any more than
5 we ask for for the formal copies at the hearing.

6 Getting back to the does 4:00 o'clock next
7 Thursday work for a last minute conference call that
8 we may have no agenda items or we may have, are you
9 all available?

10 MS. CLARK: It is fine for the staff.

11 MR. WISE: It works for us, although 4:15
12 would be better. But we can do 4:00 o'clock. I still
13 have a court hearing at 3:00 o'clock. I'm 99 percent
14 certain I will be back by 4:00, but I am 100 percent
15 sure I will be back by 4:15.

16 CHAIRMAN FARRAR: Roy, it is all right
17 with you, right?

18 JUDGE HAWKENS: 4:15 is good with me.

19 CHAIRMAN FARRAR: Nick?

20 JUDGE TRIKOUROS: Yes, 4:15 is fine.

21 CHAIRMAN FARRAR: Okay. We will do 4:15
22 on Thursday, the 4th. And we may if we're lucky have
23 no agenda items.

24 MR. WISE: I appreciate that.

25 CHAIRMAN FARRAR: Glad to help. I think

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1 that is all we had in terms of -- oh, Ms. Clark, the
2 stipulations Ms. Sexton attached to the collateral
3 estoppel brief, is that the final form of the
4 stipulation?

5 MS. CLARK: It is for now.

6 CHAIRMAN FARRAR: Oh. So you are still
7 working on that?

8 MS. CLARK: Well, I am not certain if
9 there might be any more, but it is possible.

10 CHAIRMAN FARRAR: But what is there is
11 valid?

12 MS. CLARK: That is correct. Those are
13 the stipulations that we have agreed to with Mr. Wise.

14 CHAIRMAN FARRAR: Okay. Fine. So we can
15 begin studying those more carefully. Okay.

16 Well, Roy, Nick, do you have any other
17 issues?

18 JUDGE TRIKOUROS: No. I think that is it.

19 JUDGE HAWKENS: No. That is it for me
20 except I would ask, Ms. Clark, are you going to use
21 the same procedure you used earlier in the week with
22 Judge Farrar and e-mail me a copy of the subpoena and
23 then have somebody pick it up?

24 MS. CLARK: Yes.

25 JUDGE HAWKENS: All right.

1 CHAIRMAN FARRAR: All right. And, again,
2 we're happy to have obliged on the urgent nature of
3 this because you all have been working in an urgent
4 fashion the last several weeks. Thank you all so for
5 working out things like the order of presentation.

6 And any time you need us between now and
7 the trial, one or more of us will be available. So we
8 are pleased with the way preparations are going. Call
9 us if you need us.

10 JUDGE HAWKENS: Judge Farrar, one quick
11 question, both for Mr. Wise and Ms. Clark. What time
12 approximately tomorrow do you anticipate filing your
13 responses?

14 MR. WISE: I expect that ours will come
15 near the end of the day, Judge. I am going to try to
16 get it to you before that, but I have made promises
17 like that before and fallen short.

18 JUDGE HAWKENS: I am looking for the
19 candid answer. That is all right.

20 How about you, Ms. Clark?

21 MS. CLARK: I have every intention of
22 getting it to you by the afternoon, by, say, 1:00
23 o'clock.

24 JUDGE HAWKENS: Okay. Thank you very
25 much. That is all I have, Judge Farrar.

1 MS. CLARK: One other thing, Judge
2 Hawkens, is I expect that we will get the subpoena to
3 you within the next hour.

4 JUDGE HAWKENS: All right. I will be
5 here.

6 CHAIRMAN FARRAR: Okay. If any of you get
7 to the point on those responses tomorrow night that
8 you are not going to get them in near when you hope to
9 and it is going to be a 10:00 p.m. or 11:00 p.m. deal,
10 please e-mail everybody and let them know so that
11 people aren't waiting in the office to the last minute
12 hoping to get them.

13 MR. WISE: Okay. Will do, but I don't
14 think there is any way it will get that late.

15 CHAIRMAN FARRAR: Yes.

16 MR. WISE: But I will do that, though.
17 Thank you.

18 CHAIRMAN FARRAR: Thank you all for
19 participating. And, like I said, we, the Board, are
20 ready to help on anything that helps you all get ready
21 for the case. Thank you.

22 (Whereupon, the foregoing matter was
23 concluded at 4:00 p.m.)
24
25

CERTIFICATE

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

Name of Proceeding: Pre-Hearing Conference

Docket Number: IA-050-052;

ASLB No. 06-845-01-EA

Location: (phone conference)

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