

RAS-C-92

Official Transcript of Proceedings
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: Thursday, December 4, 2008

Work Order No.: NRC-2576

Pages 757-792

DOCKETED
USNRC

December 4, 2008 (4:15pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

NEAL R. GROSS AND CO., INC.
Court Reporters and Transcribers
1323 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 234-4433

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES OF AMERICA

+ + + + +

NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD PANEL

+ + + + +

PRE-HEARING CONFERENCE

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

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

Thursday, December 4, 2008

The above-entitled conference was
convened, pursuant to notice, at 4:15 p.m.

BEFORE:

MICHAEL C. FARRAR, Administrative Judge, Chair

E. ROY HAWKENS, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

On Behalf of David Geisen:

RICHARD A. HIBEY, Esquire

ANDREW T. WISE, Esquire

of: Miller & Chevalier, Chartered

655 15th Street, N.W.

Suite 900

Washington, D.C. 20005

(202) 626-5800

On Behalf of the Nuclear Regulatory Commission:

LISA B. CLARK, Esquire

CATHERINE MARCO, Esquire

SHAHRAM GHASEMIAN, Esquire

KIMBERLY A. SEXTON, Esquire

of: Office of the General Counsel

U.S. Nuclear Regulatory Commission

Mail stop - O-15 D21

Washington, D.C. 20555-0001

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

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

4:16 p.m.

1
2
3 JUDGE FARRAR: John, let's go on the
4 record. This is Mike Farrar, the Chairman of the
5 Geisen Licensing Board. I have with me at
6 Headquarters my colleague, Judge Trikouros, Judge
7 Hawkens, Roy -- are you still there?

8 JUDGE HAWKENS: Still here.

9 THE COURT: Judge Hawkens is calling in
10 from a distant location.

11 Johanna Thibault, our law clerk, is here
12 with us, as is Karen Valloch.

13 For the parties for the staff?

14 MS. CLARK: This is Lisa Clark and with me
15 is Kimberly Sexton, Shahram Ghasemian, and Cathy
16 Marco.

17 JUDGE FARRAR: Okay, thank you. And for
18 Mr. Geisen?

19 MR. HIBEY: For Mr. Geisen, Richard Hibey
20 and Andrew Wise.

21 JUDGE FARRAR: Okay. Thank you all for
22 gathering. Sorry for the confusion about the phone
23 number.

24 I thought when we spoke last week we'd
25 have very few items on the agenda, but I'm glad we're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 getting together because we have a number of items on
2 our agenda, most of which will be quite short,
3 however. And anything you all want to bring up.

4 Again, while I won't say that quite this
5 length, when we start up on Monday I want to
6 compliment both sides for the extremely high quality
7 of the preparation in the briefs and materials we've
8 been given. And Mr. Hibey, Mr. Wise, I expected that
9 calibre from you. You've certainly lived up to your
10 reputation. The staff has, in my judgment, far
11 exceeded their previous efforts with us and Ms. Marco,
12 if you're still responsible at the top for that,
13 congratulations on that and to all your team for a
14 great effort. I will compliment you much more briefly
15 on Monday, but I want you to know how much the Board
16 appreciates getting top quality materials and
17 certainly it makes our job easier.

18 Having said that on the collateral
19 estoppel issue, we're not prepared to finally decide
20 it today, but we are leaning strongly to the view that
21 the staff cannot take the benefit of that doctrine in
22 this case, principally because of the bifurcated way
23 the matter was submitted to the Jury and the fact that
24 the case is too complicated for us to follow the
25 precedent. The staff cited about how it is the second

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 tribunal's job to go figure out what happened.

2 We're learning toward not being able to do
3 that. We could change our mind, but we wanted to tell
4 you that now so that in effect you know you have to go
5 full speed ahead with your evidence and should not
6 necessarily rely on any benefit from that doctrine.

7 At the end of the case, I think it goes
8 without saying that we do not intend to render a
9 verdict at the end of the case. Mr. Hibey, if you'll
10 make sure Mr. Geisen knows that. I think you all
11 assume that, but we would tend to follow -- unless this
12 case turns out to be a lot easier than we think it
13 will be, we would ask for the usual proposed findings
14 and briefings and stuff at the end of the case, so
15 there will be no verdict at the end.

16 In terms of the trial itself, because of
17 the work you all have done, because of our chance to
18 read the criminal transcript, and to look over a
19 number of the exhibits, you will find us, I think,
20 reasonably well prepared so you don't have to conduct
21 yourselves as if we were the Jury and you had to
22 educate us on the simplest matters. I want you to
23 bear that in mind as we talk about some of the other
24 items.

25 In terms of the trial schedule, our

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 practice here, and I suppose mostly since it's
2 basically been six hours of trial and an eight-hour
3 day, I used to try to do more and I learned that
4 everybody gets too worn out, so I think basically
5 you're talking about the first day, 9 to 10:30; 15
6 minute break; 10:45 to 12:15, another hour and a half.
7 An hour and a half for lunch, if you need that long to
8 do any reconnoitering. An hour and a half, say 1:45
9 to 3:15; 15 minute break; and then 3:30 to 5.

10 Having said that our goal besides doing
11 justice in the case is to make sure we're finished by
12 Friday night so we will -- we're happy from our point
13 of view to enlarge upon the six hours in order to
14 accomplishing things.

15 Having said all of that, what do you all
16 think if we don't give you the opportunity for opening
17 statements, you have given us a very well crafted --
18 those three pagers we asked for. Do you see a need
19 for opening statements?

20 MS. CLARK: Your Honor, this is the staff.
21 I think an opening statement would be very helpful to
22 kind of give you an outline of the case before we
23 begin presenting it.

24 THE COURT: Okay. How long do you think?

25 MS. CLARK: I think no more than 20

1 minutes.

2 THE COURT: Mr. Hibey?

3 MR. HIBEY: That is good by us, Your
4 Honor.

5 THE COURT: Let's tentatively allow that,
6 but that's something given how much you've helped us
7 get read already. That's something we would dispense
8 with if it looks at the end of this call like we have
9 any problem making the Friday deadline.

10 Before I forget, the staff submitted the
11 stipulation. Did that stipulation change at all from
12 the time you sent it to us a couple of weeks ago?

13 MS. CLARK: No, it did not.

14 JUDGE FARRAR: Okay, so we don't have to
15 -- we're up on the old and we're good on the new.

16 Okay. How long staff says they have five
17 witnesses. Let me get them in front of me here.

18 How long for each one?

19 Let's go through them. Mr. Holmberg?
20 How long for direct exam?

21 MS. CLARK: Half a day at the most.

22 JUDGE FARRAR: I notice that in your
23 description of what he's going to do, there looked
24 like a lot of background or tutorial. I hope you can
25 keep that to a minimum in terms of us -- our level of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 knowledge. In our mind, you can almost jump right in
2 and start talking about the head and the CDRM, super
3 structure and all that. We don't need to know a whole
4 lot about the operation and reactors. So if you can
5 keep that short, we'd appreciate it.

6 Mr. Hibey, assuming a half a day for Mr.
7 Holmberg, how long do you see your cross of him being?

8 MR. HIBEY: Half hour to 45 minutes.

9 JUDGE FARRAR: All right. Staff, Mr.
10 Hiser, how long for him?

11 MS. CLARK: Staff would expect about the
12 same amount of time, half a day.

13 JUDGE FARRAR: Mr. Hibey?

14 MR. HIBEY: Forty-five minutes at the
15 outside, I think, Your Honor.

16 JUDGE FARRAR: It might be good to try to
17 do the two of them, get them done the first day. How
18 about Mr. Martin, Ms. Clark?

19 MS. CLARK: I think two hours at the most.

20 JUDGE FARRAR: Okay. Mr. Hibey?

21 MR. HIBEY: Thirty to 45 minutes.

22 JUDGE FARRAR: Staff, Mr. Goyal?

23 MS. CLARK: For Mr. Goyal, a half a day.

24 MR. HIBEY: I'd say probably at the
25 outside, 45 minutes.

1 JUDGE FARRAR: And staff, Mr. O'Brien?

2 MS. CLARK: I think maybe an hour.

3 JUDGE FARRAR: Mr. Hibey?

4 MR. HIBEY: Well, I'd like to give myself
5 a little more time on that because I'll be hearing him
6 for the first time.

7 JUDGE FARRAR: Right.

8 MR. HIBEY: So could we agree to a maximum
9 of an hour?

10 JUDGE FARRAR: Yes, well, if we get to the
11 point about the correctness of the penalty, there's --
12 as far as I know, there's not a whole lot of precedent
13 here, so we would not want to shortcut any discussion
14 of him and how they do -- how they tend to do business
15 and what --

16 MR. HIBEY: Might I request an hour and a
17 half, then?

18 JUDGE FARRAR: Yes.

19 JUDGE HAWKENS: I think you should take as
20 reasonably necessary, Mr. Hibey.

21 MR. HIBEY: Thank you, Your Honor.

22 JUDGE FARRAR: Yes. Judge Hawken is
23 certainly correct. This was just an effort to get a
24 feel for how we stand in the five days.

25 And Ms. Clark, can you arrange that Mr.

1 O'Brien be here to be available for the Board after
2 Mr. Geisen testifies as well as before?

3 MS. CLARK: Yes, we can arrange that.

4 JUDGE FARRAR: Just in case there's
5 something that emerges from Mr. Geisen's testimony
6 that we've wanted to ask for his opinion and Mr.
7 Hibey, don't want you all to get nervous. I think
8 there's some, you know, what the staff thinks about
9 enforcement penalty is interesting and we, you know,
10 will pay some attention to. But the fact that we want
11 to question him does not mean in any way that he has
12 the last word in terms of our independent judgment.

13 MR. HIBEY: Yes, I understand. Thank you,
14 Your Honor, for that clarification.

15 JUDGE FARRAR: Well, then if look at the
16 staff witnesses, even if we crunch Mr. Holmberg and
17 Dr. Hiser into a day, I would have to tell you all
18 that PFS, I found that whenever the lawyers told me
19 how long something was going to take it turned out to
20 be double. If we do that theory we can get through
21 all of them in two days.

22 Ms. Clark, I would say be sure with Mr.
23 Holmberg that you, you know, he knows the level of
24 expertise, not only of Judge Trikouros who, he would
25 not agree with me on this, but I dare say that he can

1 serve as an expert witness for the staff, and of
2 course, not only has his own knowledge, but is here to
3 teach us and we have prepared a great deal on this
4 case because of the importance of it. We don't need
5 all the people watching from their homes,
6 webstreaming, might want to know how a reactor works.
7 We know how it works. Jump me, I'll jump right in and
8 start with what is relevant to this case, half-hour,
9 hour, say, there, could help us.

10 In particular, well, okay, let's keep
11 going and see how Mr. Hibey, how long do you think for
12 Mr. Geisen?

13 MR. HIBEY: Two hours.

14 JUDGE FARRAR: That's all?

15 JUDGE HAWKENS: I'm sorry. You broke up
16 for me, Mr. Hibey. How long?

17 MR. HIBEY: Forgive me, Your Honor. We
18 are estimating two hours on direct.

19 JUDGE HAWKENS: Thank you.

20 JUDGE FARRAR: And I think you all said
21 that you would reach an agreement that when the staff
22 cross examines Mr. Geisen, they not be limited to the
23 scope of the direct. In fact, that would be their own
24 direct exam. And so Ms. Clark, how long do you all
25 need for that?

1 MS. CLARK: I would expect at most two
2 hours..

3 JUDGE FARRAR: Okay, now I notice that the
4 staff has on its exhibit list I think it was both
5 versions of Mr. Geisen's prior testimony, namely, the
6 Office of Investigations, let me get it right in front
7 of me.

8 (Pause.)

9 Exhibit 71, his testimony at the criminal
10 trial and Exhibit 79, the OI interview. Is there
11 going to be -- those two things are going to come in
12 by stipulation?

13 MS. CLARK: Yes, Your Honor.

14 JUDGE FARRAR: You're not objecting, Mr.
15 Hibey?

16 MR. HIBEY: No, Your Honor.

17 JUDGE FARRAR: Okay. I have to admit to
18 being a little perplexed by what happened at the
19 criminal trial with the summary of that testimony. So
20 now we will have his live testimony in front of us and
21 two previous testimonies? You just envision that we'd
22 all have that in front of us and it would be up for
23 you all to argue at the end what was consistent or
24 inconsistent and so forth?

25 MS. CLARK: Yes, Your Honor.

1 MR. HIBEY: Yes.

2 JUDGE FARRAR: Okay. And I know you've
3 agreed to have all the previous two pieces in. Do you
4 think that's an easier and better way to do it than
5 only having -- only having his live testimony and you
6 being forced to pull out pieces that are consistent or
7 inconsistent?

8 MR. WISE: Your Honor, I think the reason
9 we've come to this solution is quite frankly as a
10 result, in our view, at least of how unwieldy the
11 effort was by the prosecutors to put Agent Ulie on to
12 summarize the OI. It was an approach that I think was
13 fraught with the potential for needless discussion
14 about interpretation of his words.

15 My guess is that the actual operation of
16 this will be easier than the theoretical and that I
17 don't think you're going to see a situation where he
18 varies much from what he said before, but to the
19 extent that there are portions that the staff wants to
20 call out and ask him about, I think it's good for the
21 Board to have the entire transcript in front of it and
22 we can certainly work our way through any portions if
23 those things come up.

24 My guess is that there's not going to be
25 a lot of -- for lack of a better word -- impeachment

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.realrgross.com

1 with inconsistencies.

2 JUDGE FARRAR: Okay, thank you for that,
3 Mr. Wise.

4 I take it that we can count on the staff
5 to make a reasonable effort if there are -- since
6 those previous testimonies will be in front of us, I
7 suppose it's in there, but to the extent that you want
8 to rely on any inconsistencies since you wouldn't have
9 to face him with his prior inconsistent statements and
10 it's already in the record, we nonetheless would
11 expect you to do that to give him an opportunity to
12 explain whether that, in fact, is consistent or
13 inconsistent or not.

14 MS. CLARK: Yes, Your Honor, that is our
15 expectation.

16 JUDGE FARRAR: Okay. Technically, I
17 suppose you could later point to that and say well,
18 it's in front of you, but I think in fairness and to
19 aid us in making a proper decision, we want to make
20 sure that anything that you're aware of that's
21 different gets called to his attention and he gets an
22 opportunity to explain it, if he can.

23 All right, well with that, with not having
24 -- then we shouldn't have a problem with the five
25 days, even if we don't get the first staff witnesses

1 in in one day, even if we had three -- if the staff
2 witnesses took three days, we're still finishing by
3 Thursday with some time to spare. Okay?

4 Well, then let us go off the line for a
5 minute and caucus with Judge Hawkens and we'll be
6 right back to you in a minute or two.

7 (Off the record.)

8 JUDGE FARRAR: All right, we're back on
9 the record. The Board has caucused and thinks that
10 even adding a little bit of a multiple, we always do
11 with trial lawyers, that we shouldn't have any trouble
12 finishing within the week and maybe by Thursday, so we
13 will allow you to make the opening statements. That
14 raises the question -- do you want to plan now for
15 making closing arguments or would, those would not be
16 webstreamed. Only the first day is being webstreamed,
17 or would you prefer I would guess that we will have
18 oral arguments after we get all of your briefs in, so
19 Ms. Clark, are you interested in the closing argument?

20 MS. CLARK: Your Honor, we wouldn't be
21 opposed to one, but I think that we could just present
22 our arguments in our briefs.

23 JUDGE FARRAR: Mr. Hibey, what about you?

24 MR. HIBEY: We think while everything is
25 fresh that it does make sense to do a closing, Your

1 Honor.

2 JUDGE FARRAR: All right, then that is
3 your preference then Ms. Clark, let's go with Mr.
4 Geisen since he is the one at risk here. Let's go
5 with their preference on that, and we will have a 15
6 or 20 minute closing argument assuming we finish by
7 our Friday deadline. But we will have closing
8 arguments, but that will not negate the opportunity
9 for oral argument after your briefs come in down the
10 road.

11 MR. HIBEY: Thank you, Your Honor.

12 JUDGE FARRAR: You're welcome.

13 On exhibits, you all, you planned to
14 introduce those as we go along, or are we going to
15 have a big document dump of all of them at the
16 beginning. What is your thinking on that?

17 MS. CLARK: Your Honor, I actually spoke
18 with Mr. Wise earlier today. I think the staff's
19 preference would be just to put all of the exhibits in
20 at the very beginning.

21 MR. WISE: We don't have any objection to
22 that.

23 JUDGE FARRAR: What was that, Mr. Wise?

24 MR. WISE: We don't have any problems
25 proceeding that way. I think it makes it much more

1 efficient.

2 JUDGE FARRAR: Okay. Johanna is not very
3 tall. Will I still be able to see the top of her head
4 when you hand her all those?

5 MR. WISE: As you know from yesterday, I
6 tend to send just multiple copies of single exhibits,
7 so we'll live with that.

8 (Laughter.)

9 JUDGE FARRAR: Okay, well then if that is
10 your preference, we'll take them all.

11 MR. HIBEY: Your Honor, this is Dick
12 Hibey. It's entirely possible, quite probable, that
13 there may be impeachment exhibits not previously
14 marked.

15 JUDGE FARRAR: That's okay.

16 MR. HIBEY: All right.

17 JUDGE FARRAR: I was not foreclosing that,
18 but we've had some parties who like to, you know, go
19 through the regular routine, and you don't mark
20 formally, mark an exhibit until your witness is ready
21 to sponsor it, but is there going to be any
22 controversy about any of the exhibits?

23 MR. HIBEY: We don't think so.

24 JUDGE FARRAR: Okay, then let's get them
25 all in at the beginning.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 JUDGE HAWKENS: Judge Farrar?

2 JUDGE FARRAR: Yes, sir.

3 JUDGE HAWKENS: My experience given at
4 this volume, I would anticipate at least two hours,
5 perhaps a little bit longer for Johanna to get them to
6 review them and to put them, introduce them as part of
7 the record. So I just want to include that in the
8 total timing.

9 JUDGE FARRAR: Yes. Of course, these are
10 going to be. That's a good point, Judge Hawken. I
11 think, though, these will all be pre-marked and if
12 Johanna, it may be that we proceed while she is a
13 little bit behind, you know, just periodically
14 catching up. She has to mark the date and so forth on
15 them and we may, for this purpose, she will be serving
16 as though she is the Court Clerk and we may have to do
17 without her law clerk duties.

18 Do we, do you want to, would you do these
19 after opening statements?

20 JUDGE TRIKOUROS: Your Honor, I am
21 thinking out loud. Do you want me to go off the air
22 for a minute?

23 JUDGE FARRAR: No, go ahead.

24 JUDGE TRIKOUROS: This strikes me as a
25 clerical exercise. The parties appear not to have any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 objection to the exhibits that have been identified
2 and listed. If that is the case, then if Johanna, if
3 I may use her first name, had an exhibit list, she
4 could assume even now that they are all going to be
5 received into evidence and she could mark them on her
6 exhibit list accordingly. And then, I think that will
7 make life a lot easier.

8 JUDGE FARRAR: And then fill out of the
9 rubber stamp mark at her leisure later on?

10 JUDGE TRIKOUROS: Yes, right.

11 JUDGE FARRAR: Mr. Hawkens, is that all
12 right with you?

13 JUDGE HAWKENS: That is fine with me. I
14 think it would be well at the beginning of the
15 evidentiary hearing when we are on the record to make
16 both parties concede that there is no objections to
17 any of the exhibits. And then when you are prepared,
18 Judge Farrar, to accept them into the record so long
19 as no objection from any party that is part of the
20 record, that is fine with me.

21 JUDGE FARRAR: Okay, good. Let's do that,
22 then. Then we will have the opening statements and
23 then the transfer of the exhibits and that will take
24 a little while and then we will move ahead.

25 MS. THIBAUT: This is Johanna Thibault,

1 the Clerk. When you give the copies of the exhibits,
2 I know that staff likes to put them in binders, but I
3 have to take them out of the binders and then SECY has
4 to take them out of the binders because they have to
5 get scanned. So if you could just put a separation in
6 between and not go through the process of putting them
7 in binders, that would be better. Even if you brought
8 them to me in a box, that would be better than a
9 binder, if that makes sense.

10 MS. CLARK: That is fine. We will do
11 that.

12 MS. THIBAUT: Okay, great.

13 JUDGE FARRAR: With this being the rare
14 occasion that -- new subject here. With this being
15 the rare case where demeanor credibility is important
16 or at least could prove to be important, we would like
17 to have you all instruct your witnesses to kind of aim
18 their chair halfway between counsel and the Board so
19 that they can look at you all when you are asking the
20 question and then deliver their answer to us.

21 We would rather not see the side or back
22 of their head and so if you can instruct them that it
23 is important that they talk to us, we would appreciate
24 it. Rather than have us instruct them during the
25 course of the trial, if they forget, then I will just

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 remind counsel to remind your witnesses.

2 Is that any problem for anybody?

3 MR. HIBEY: No, Your Honor.

4 MS. CLARK: That is fine, Your Honor.

5 JUDGE FARRAR: Purely a logistical matter,
6 Mr. Hibey, your people today or tomorrow will be sure
7 that they notify Karen Valloch of all the people who
8 are coming with you, whether they are paralegals,
9 whoever, then she can prearrange with security so that
10 it is easier for you to get admitted at the front
11 desk.

12 Everybody needs a couple of forms of ID
13 and so forth. I will work with her and she will, as
14 you know, have to escort everybody up and try not to
15 leave anybody off your list.

16 MR. HIBEY: Yes, Your Honor.

17 JUDGE FARRAR: Staff, you will take care
18 of all that for all your people. You have no problem
19 with that, right?

20 MS. CLARK: Yes, we can take care of ours.

21 JUDGE FARRAR: Okay, I think that takes
22 care of the Board's many items.

23 Ms. Clark, anything the staff needs to ask
24 us?

25 MS. CLARK: Yes. There was one more

1 matter. As you know, we have listed as exhibits
2 transcripts from the criminal proceedings for some of
3 our witnesses.

4 JUDGE FARRAR: Right.

5 MS. CLARK: And in particular, one of
6 those witnesses is Mr. Moffitt and we have one also
7 identified for Mr. Gibbs.

8 JUDGE FARRAR: right.

9 MS. CLARK: Our preference in the hearing
10 would be to read the relevant portions of those
11 transcripts into the record at the appropriate times.
12 We think that it's very helpful for the Board to hear
13 the testimony and we think that it's very important to
14 provide it for the context of our case.

15 However, I understand that Mr. Wise had an
16 objection to this. So we wanted to bring that to your
17 attention.

18 JUDGE FARRAR: Okay, well, let me ask you,
19 Ms. Clark, how long would those portions be that you
20 would be reading?

21 MS. CLARK: For Mr. Moffitt, we expect
22 about 20 pages of the transcript and for Mr. Gibbs,
23 approximately 10 pages.

24 JUDGE FARRAR: Mr. Wise?

25 MR. WISE: My objections, Your Honor, I

1 guess are two-fold. One is that we had agreed to the
2 admission of both of those testimonies on the
3 condition that they come in in their entirety. I
4 think it's important that the Board see them in their
5 entirety and not portions.

6 If the staff wants to call out portions of
7 the testimony in their argument that's fine, but in
8 terms of what evidence is in front of the Board, I do
9 think it's important that they come in as a whole.

10 My position with Ms. Clark as to the
11 reason that I didn't particularly like the idea of
12 reading them is because is one of efficiency. The
13 second is I think that by definition when you have a
14 reading of the testimony, the reader will put their
15 interpretation of the witness into their reading and
16 I think that's not appropriate. If the Board reads
17 the transcript and I think that is the most integral
18 way to receive that evidence. That's the basis of our
19 position.

20 JUDGE FARRAR: Okay. Ms. Clark, unless
21 this was a -- I've got a couple of immediate reactions
22 and then the Board will caucus. But let me ask you a
23 couple of questions first.

24 My immediate reaction is I can read and --
25 well, the three of us can read the 20 pages faster

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 than you can read them to us and I wouldn't mind if
2 you say okay, at this point I'd like to call the
3 Board's attention to the exhibit. And if you want us
4 to take the exhibit out and actually read it to
5 ourselves at that point, just so it follows along with
6 the continuity of your case, I'd be willing to do
7 that. But both in terms of the efficiency and the
8 dramatic intonations that a reader could give it, is
9 there any reason you can't just have -- ask us to
10 pause and read it at that point?

11 MS. CLARK: Well, we would like to have it
12 read into the transcript of the hearing. And I
13 understand that it can be read, obviously, but we do
14 believe that it's helpful to have an oral
15 presentation. This would be of benefit to anybody
16 else as well who is watching the hearing.

17 JUDGE FARRAR: When would you do this?

18 MS. CLARK: We would do it in the -- in
19 the order that it would make sense in our
20 presentation. The purpose of calling out the relevant
21 pages is really just for efficiency. Obviously, the
22 entire transcript would remain an exhibit in the
23 hearing and Mr. Wise, of course, is free to enter into
24 any portions that he would like to do.

25 Finally, I'd just like to say that of

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 course, it's certainly not our intention to present it
2 in a way that dramatizes it in any respect. This is
3 simply a matter to get it into the record and again,
4 Mr. Wise could object if the reading is in his view
5 inappropriate and call that to the attention of the
6 Board.

7 JUDGE FARRAR: And we certainly weren't
8 accusing you of deliberately doing that, but I think
9 any of us when we read something we tend to put a
10 little emotion into it.

11 Let us do this. Let us caucus us on this
12 for a moment and we will be back --

13 MR. WISE: Judge, can I have one last
14 comment before you go off the record to caucus?

15 JUDGE FARRAR: Yes, go ahead.

16 MR. WISE: It is this. Our agreement to
17 these transcripts which are hearsay was based on the
18 idea that if they came in in their completeness, there
19 was not an issue about the potential of unreliability
20 of the documents.

21 So if the staff wants to read them in, our
22 position is going to be that they have to read the
23 entire thing or else we will object on the grounds of
24 hearsay. As I think we've discussed over the last
25 couple of months on this.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 JUDGE FARRAR: Ms. Clark, do you want to
2 respond on that?

3 MS. CLARK: It seems to me that again, the
4 entire transcript will be in the record. We would be
5 happy to give Mr. Wise the portions that we intend to
6 read into the record, and that will give him the
7 opportunity to designate any additional portions that
8 he would like to have read in, in the event that he
9 believes that for some reason, the portions that we
10 have are incomplete.

11 JUDGE FARRAR: All right, well, let us --

12 JUDGE HAWKENS: May I ask the staff a
13 question? This is Judge Hawkens. While we, you all
14 suggested, and we were fully on board with having an
15 exhibit submission at the outset. What would you
16 think of this as an alternative, having all the
17 exhibits submitted at the outset, but then folding the
18 Moffitt and the Gibbs transcript into the transcript
19 of the proceeding at the appropriate time, and rather
20 than reading it, having it admitted at that point and
21 as I say folded in, so the reader of the transcript
22 would be able to look at it at that point.

23 JUDGE FARRAR: Roy, you are suggesting
24 there that we would be, in essence, treating that like
25 we do in every other case, the pre-file direct

1 testimony of a witness?

2 JUDGE HAWKENS: Correct, again, that's
3 just a suggestion. I don't know how Mr. Hibey or Mr.
4 Wise, whether they would object to that, but I just
5 threw it out there for you all to consider.

6 JUDGE FARRAR: Ms. Clark, how is that a
7 compromise for you?

8 MS. CLARK: Well, Your Honor, this is a
9 case where the staff has the burden of persuasion. I
10 do believe that there are certain segments of that
11 testimony that are important to present in order to
12 give the context to all the evidence that we are going
13 to present.

14 I think that it is more important to allow
15 us to present our full case in all of the context that
16 we want to provide, especially since the entire
17 transcript will be in, and defense counsel will have
18 every opportunity to add additional segments if they
19 think that somehow portions we put in are incomplete.

20 JUDGE FARRAR: Let me ask this. Why
21 wouldn't it make sense, we treat it even though it
22 will be denominated in an exhibit, we will treat it
23 also although it were pre-filed testimony, direct
24 testimony. We put that in the record, bind it in the
25 transcript so number one, anyone reading the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 transcript at that point has it in front of them, and
2 let you at that point, rather than read from it, tell
3 us which particular portions you can put on the record
4 of our case and the immediately following pages of the
5 transcript, or we will have you do it ahead of time.

6 But you are offering this exhibit, and you
7 want it to be bound in the record, and you want to
8 call our attention particularly to pages such and
9 such, lines such and such, and then Mr. Wise can say
10 we would like you while you are reading that to read
11 these other pages and we have done it in a moments
12 time rather than a lot of time and anybody, we get the
13 full picture of it and like I say, we can even stop
14 then and, well, I don't know if we want to stop and
15 read the whole thing. But there anybody picking up
16 the transcript later would have it.

17 Mr. Wise, would that be something that you
18 could live with?

19 MR. WISE: I think that is an approach
20 that we could live with, because it was always our
21 belief that if they came in in in their entirety, they
22 would be part of the record as though the witness has
23 testified.

24 But it is remains critical that the entire
25 portion of the transcript. If you call out certain

1 portions, that is fine. But that is argument. And in
2 the whole point of the approach that we have agreed
3 to, so that there is not a situation where a witness
4 has certain parts of their testimony, which has to be
5 taken as a whole to be understood fairly, brought out
6 with that witness in front of the Board, in case there
7 was a question of context.

8 I think the answer is that we do not have
9 an objection to the approach as long as it
10 contemplates the transcript not being chopped into
11 parts before the parties argue what is natural for
12 parties to call out the parts of the testimony that
13 they believe supports their case.

14 JUDGE FARRAR: Ms. Clark, I will give you
15 one last opportunity before we caucus to tell me why
16 my modification of Judge Hawken's suggestion is not
17 something that you can live with or make my day and
18 tell me that it is something you can live with.

19 MS. CLARK: Well, I would just like to say
20 that I do believe that it is best to have a live
21 witness. And the fact of the matter is, the reason we
22 do not have live witnesses for all our testimony is
23 because of the extremely short time schedule that we
24 are working with. I don't think it is the same to
25 have just to put a written document into the record

1 and have the fact finders just read it.

2 Therefore, I think already this is a
3 compromise for us to not have the live witness, but
4 just to rely on the criminal transcript and read it
5 into the record. Given the fact that the entire
6 transcript will be part of the record, I really do
7 have a difficult time understanding how this is going
8 to prejudice the defense in any way, given the fact
9 that they will have the same opportunity to place, to
10 read into the record any portions that they think are
11 important.

12 JUDGE FARRAR: I guess I have two
13 questions. First would be if it is bound into the
14 transcript, why we need to have somebody else then
15 read it into the transcript, why that is duplicative.
16 But second, if it was that important that we get some
17 specific take or angle about what these witnesses are
18 saying, that they weren't called to testify live.

19 MS. CLARK: Well, we had a very short time
20 to prepare for this hearing. As a consequence, we
21 have had to not take short cuts. We have not been
22 able to do everything that we would perhaps if we had
23 more time. It is very time consuming for us to issue
24 subpoenas. We have to make travel arrangements for
25 these witnesses. They are all over the country and it

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is expensive and so we decided that we would only
2 bring in the most critical witnesses that we had.

3 MR. HIBEY: Excuse me, Your Honor?

4 JUDGE FARRAR: Go ahead.

5 MR. HIBEY: This is Dick Hibey. If you
6 assume for the moment that they had a live witness,
7 the one thing that you would not do is have that live
8 witness coming in in the middle of somebody else's
9 testimony, giving testimony, then leaving, then coming
10 back in at a later time while that witness or some
11 other witness is on the stand or under cross
12 examination.

13 It seems to me that the excuses being
14 proffered for the approach that they want to take
15 doesn't hold up. In fact, what happens is that the
16 other hearsay character of the selective use of these
17 testimonies really dominates the fact-finding
18 situation.

19 Now I know that we are in front of Judges
20 and I know that the Judges can make sense of these,
21 but there is, I think, an overarching question of
22 whether the approach is fair. If the rule of
23 completeness is the ultimate justification for the
24 inclusion of the entire transcript into the record of
25 the case, then that should not be compromised by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 selective reading of a portion of the transcript
2 during the testimony of somebody else.

3 It is just wrong. Is not even an
4 appropriate method of cross examination. It is
5 parachuting something in from somebody else. It is
6 almost in the nature of, in fact, it is in the nature
7 of argument, in the middle of the taking of testimony.

8 So it seems to me that the basis upon
9 which our side agreed that the testimony of somebody
10 could be used without that person appearing should be
11 maintained as a complete unit of evidence to be
12 inserted into the record at the beginning of the case,
13 or use in final argument and in any subsequent
14 pleadings where they wish to make a point about the
15 testimony of that individual.

16 JUDGE FARRAR: Al right, thank you, Mr.
17 Hibey. I think the Board understands the arguments of
18 what's at stake here. So let us go off the line here
19 for a moment and caucus. We will be back to you
20 shortly. Thank you.

21 (Off the record.)

22 JUDGE FARRAR: Okay, the Board is back.
23 We've caucused. And on this matter of the Moffitt
24 Gibbs testimony. We will not allow any reading of it.

25 Ms. Clark, you're welcome to leave it as

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 just an exhibit. You're welcome to have it bound into
2 the record at any point you want and know it was read
3 by them. But that would be the entire portion of it.
4 And you're welcome at that time to draw our attention
5 to particular pages.

6 Your opponents can object at that point.
7 You're even welcome -- if they don't object to call
8 our attention to particular pages and we'll stop for
9 a minute and read them right then and we probably will
10 make an effort to read the entire testimony before the
11 trial starts.

12 So you can, of course, you'll be able to
13 call our specific attention to any portions during
14 your closing arguments, during your breaks, and during
15 any oral arguments that follows. So I think that's
16 the way to get it in, to have our attention called to
17 it, but not to single out in a way that would be time
18 consuming and duplicative, to have it read to us. We
19 can read it just as well ourselves.

20 That will be our ruling on that. The
21 staff had indicated they had other points they wanted
22 to bring up?

23 MS. CLARK: That's it, Your Honor.

24 JUDGE FARRAR: Okay. Thank you. Mr.
25 Hibey, Mr. Wise, do you have any other matters to

1 bring up?

2 MR. HIBEY: Your Honor, I believe the only
3 issues for us are logistical. The idea of getting
4 into the property and getting into the building with
5 all of the materials that we're going to have to carry
6 in, we were just -- we'll probably have to speak to
7 Ms. Valloch about that?

8 JUDGE FARRAR: Right. And I assume she
9 will be better than I was about giving you good
10 logistical information.

11 MS. VALLOCH: This is Ms. Valloch. There
12 is a parking garage right across the street, right
13 attached to the Metro and across the street from NRC.
14 And I would strongly suggest that if you have a lot of
15 materials, that would be the way to go.

16 JUDGE FARRAR: No, no.

17 MS. VALLOCH: You don't agree?

18 JUDGE FARRAR: They have to be able to
19 unload somewhere.

20 MR. HIBEY: We have had the privilege of
21 parking on the property. The staff arranged that for
22 us on the occasion of a meeting we had some months
23 ago. And I don't want to oppose anyone's hospitality
24 too greatly, but the closer we can get to the
25 building, the better because we're going to be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 carrying a lot of stuff. We'll probably have to make
2 two or three trips.

3
4 JUDGE FARRAR: I would think we should be
5 able to -- even if we can't have you leave your car on
6 the property, get permission for them to come into the
7 garage, escorted, and unload at the elevator and then
8 drive their car outside.

9 MS. VALLOCH: I'll do the best I can with
10 the parking, you know, requirements.

11 JUDGE FARRAR: I don't mind them parking
12 across the street, but they have to be able to get in
13 here.

14 JUDGE HAWKENS: We will look into that and
15 Ms. Valloch, we'll get back to you shortly.

16 MR. HIBEY: Thank you, Your Honor.

17 JUDGE FARRAR: Anything else we need to
18 take up? All right, well, again I commend you and Ms.
19 Clark you had mentioned the short time frame and we do
20 understand what the parties have been laboring under.
21 And we appreciate the efforts and we can assure both
22 sides we are going to pay the utmost attention to all
23 the evidence you put in front of us in whatever form.
24 So we thank you for you efforts and Ms.
25 Clark, anything else?

1 MS. CLARK: No, Your Honor.

2 JUDGE FARRAR: Mr. Hibey?

3 MR. HIBEY: No, Your Honor.

4 JUDGE FARRAR: Then we will sign off.

5 (Whereupon, at 5:25 p.m., the pre-hearing
6 conference was adjourned.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

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: Prehearing Conference

Docket Number: IA-05-052;

ASLB No.: 06-845-01-EA

Location: (teleconference)

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


Katherine Sykora
Official Reporter
Neal R. Gross & Co., Inc.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealgross.com