RAS C-97

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Hearing ITMO David Geisen

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

DOCKETED
USNRC

December 16, 2008 (12:35pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Location: Rockville, Maryland

Date: Friday, December 12, 2008

Work Order No.: NRC-2569 Pages 2005-2342

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

TEMPLATE= SECY-032

DS-03

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD PANEL

HEARING

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

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

Friday,
December 12, 2008

The above-entitled matter came on for further hearing, pursuant to notice, at 8:30 a.m.

BEFORE:

MICHAEL C. FARRAR, Administrative Judge, Chair

E. ROY HAWKENS, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

APPEARANCES:

On Behalf of David Geisen:

ANDREW T. WISE, Esquire
RICHARD HIBEY, ESQ.
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;
SHAHRAM GHASEMIAN, Esquire; and
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

TABLE OF CONTENTS

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Kenneth O'Brien	2009	2145	2227 2244	2239
James Leuhman	2250 2284			

EXHIBIT NO.		MARK	RECD
Geisen			
22	Enforcement Notification	2162	2289
23	OI Report	2170	2293
24	Martin Interview	2174	2295
25	Geisen Interview	2175	2296
27	OIG Report to Congress	2202	2302
28	SDT Form	2241	2302
Staff			
85	Geisen Work Strategy	2288	2288

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

2 (8:31 a.m.)

3 JUDGE FARRAR: Well, we've accomplished

4 one goal: we all made it on time five days in a row,

5 notwithstanding Washington traffic, and so forth. So

6 one job accomplished.

7 All right. Mr. Ghasemian, you were going

8 to question Mr. O'Brien?

9 MR. GHASEMIAN: Yes, Your Honor.

10 JUDGE FARRAR: Okay. Mr. O'Brien, if you

11 would take the witness stand. Mr. O'Brien, please

12 raise your right hand.

13 WHEREUPON,

14 KENNETH O'BRIEN

15 was called as a witness by Counsel for the NRC Staff

16 and, having been first duly sworn, assumed the witness

17 stand, was examined and testified as follows:

18 JUDGE FARRAR: Thank you. And for the

19 benefit of the people in the courtroom, and anyone

20 watching on the broadband, we are going to have

21 another witness this afternoon, Mr. -- or later this

22 morning, Mr. Layman (phonetic.)

23 MR. GHASEMIAN: Leeman (phonetic).

24 JUDGE FARRAR: Leeman (phonetic). And we

25 have a sequestration rule, which means that Mr.

1 Luehman is not allowed to know the testimony of
2 Mr. O'Brien. Mr. Luehman is aware of that, but
3 anybody watching is directed that if you were to
4 approach Mr. Luehman to tell him about Mr. O'Brien's
5 testimony there would be some who might view that as
6 an obstruction of justice. So don't do it.
7 Go ahead, Mr. Ghasemian.
8 MR. GHASEMIAN: Thank you, Your Honor.
9 DIRECT EXAMINATION
10 BY MR. GHASEMIAN:
11 Q Good morning, Mr. O'Brien.
12 A Good morning.
13 Q Could you state your name and spell it for
14 the record, please?
15 A Kenneth G. O'Brien, O, apostrophe, capital
16 B-R-I-E-N.
17 Q And where do you live?
18 A I live in Oswego, Illinois.
19 Q And where do you work?
20 A I work in Lisle, Illinois, at the
21 Region III Office for the Nuclear Regulatory
22 Commission.
23 Q And how long have you been with the NRC?
24 A Since July of 1990.
25 Q And what's your current position?

1 A I am the Enforcement Officer in
2 Region III.
3 Q And how long have you been in that
4 position?
5 A Approximately three and a half to four
6 years.
7 Q Generally, what are your duties as an
8 Enforcement Officer?
9 A My responsibility is to oversee and
10 provide guidance to the region in terms of its
11 implementation of the NRC's enforcement policy.
12 Q What positions did you hold prior to your
13 current position?
14 A Previously, I had been the Branch Chief
15 for the Decommissioning Branch in the region, the
16 Branch Chief for the Materials Inspection Branch in
17 the region, the Branch Chief for the Fuel Cycle Branch
18 in the region, the Acting Branch Chief for Reactor
19 Branch. Previous to those positions I was a Senior
20 Project Engineer in the Division of Reactor Safety.
21 I was a Senior Resident Inspector at the Paducah
22 Gaseous Diffusion Plant for the NRC. I was the
23 Resident Inspector and Acting Senior Resident
24 Inspector at the Kewaunee Nuclear Plant. And I was a
25 Reactor Engineer in the region.

1 Q Let me remind you to direct your answers
2 to the Board, please.
3 A You told me I'd have to remember that, and
4 I have a very short --
5 (Laughter.)
6 JUDGE FARRAR: Well, some of us forget to
7 turn off our cell phones, so --
8 (Laughter.)
9 -- don't feel bad.
10 THE WITNESS: Appreciate the reminder.
11 Thank you, sir.
12 BY MR. GHASEMIAN:
13 Q Could you briefly tell us about your
14 educational background?
15 A I have a Bachelor's in Nuclear Engineering
16 from the University of Wisconsin-Madison. I have
17 graduate studies as an INPO Fellow, University of
18 Wisconsin-Madison. And those are my two activities
19 primarily from an education standpoint.
20 I also am a graduate of the NRC's Senior
21 Executive Candidate Development Program. I'm an SES
22 candidate.
23 Q Does the NRC have a policy for taking
24 enforcement actions against individuals?
25 A Yes, we do.

1 Q And in what document do we find that
2 policy?
3 A It's in the NRC's enforcement policy,
4 previously called NUREG 1600.
5 Q Do you want to pull up Staff Exhibit
6 Number 1? Do you see that on your screen?
7 A Yes, I do.
8 Q Is that the policy that you were referring
9 to?
10 A Yes, it is.
11 Q Was this policy in effect in the 2006/2005
12 time period?
13 A Yes, it was.
14 Q It says that it was published in the
15 Federal Register in March 2005. So it was in effect
16 after March 2005?
17 A That's correct.
18 Q What is the purpose of the NRC enforcement
19 policy?
20 A If you go a few pages into the policy,
21 there is a paragraph that specifically articulates
22 that. It's to deter non-compliance and encourage
23 others to comply.
24 Q And what are the goals of the policy?
25 JUDGE FARRAR: Well, I -- I missed the

1 first part of that sentence.

2 THE WITNESS: I said if you go a couple of

3 pages further, if you'd go further into the document,

4 I'll read it specifically for you, so it's clear. As

5 an engineer, I tend to try not to memorize things,

6 Your Honor.

7 JUDGE FARRAR: Oh. No, no. Just

8 paraphrasing is fine. You described the purposes of

9 it, I think.

10 THE WITNESS: The purpose is to deter non-

11 compliance and to encourage others to comply through

12 our actions.

13 BY MR. GHASEMIAN:

14 Q Mr. O'Brien, I'd ask that you slow down

15 your answers. I think Mr. Wise may have met his match

16 as far as speaking fast. So slow down, so we can --

17 (Laughter.)

18 JUDGE FARRAR: Mr. Wise, that was -- that

19 was clearly a compliment. I don't know why you are

20 trying to --

21 (Laughter.)

22 BY MR. GHASEMIAN:

23 Q So what are the goals of the policy?

24 A The goals of the policy? Could you be a

25 little more specific?

1 Q I'll withdraw that question. How does the
2 Staff go about achieving the purpose of the policy?
3 A By taking each individual enforcement
4 action, evaluating it against the guidance in the
5 policy, developing a consensus position along with
6 Staff, and then processing it with the policy's
7 guidance.
8 Q Is the Staff required to follow the
9 enforcement policy?
10 A Yes.
11 Q Turning to page 39 -- and I'll scroll
12 down --
13 JUDGE FARRAR: Wait. Ask that one again.
14 BY MR. GHASEMIAN:
15 Q Is the Staff required to follow the
16 enforcement policy?
17 A Yes.
18 JUDGE FARRAR: Does your answer imply or
19 not imply that the enforcement policy is so clear as
20 to what you should do that it's simply a matter of,
21 look at the policy, and that gives you your answer?
22 Or is there some discretion involved?
23 THE WITNESS: Your Honor, every case is
24 done on a case-by-case basis. There is no -- there is
25 no direct straight line, if this happens, that

1 happens. You take into consideration a myriad of
2 factors. There is a lot of judgment required in
3 implementing the policy.
4 JUDGE FARRAR: Okay. Thank you.
5 JUDGE TRIKOUROS: So, for example, you
6 wouldn't just connect two dots, you know, Mr. X or
7 Ms. X got an e-mail, the e-mail said something,
8 somewhere down the road something happened that that
9 e-mail would have affected, a party said they didn't
10 read the e-mail or don't remember it, would that be a
11 connection you would make, or would you look into that
12 further? How would that work?
13 THE WITNESS: We would tend to look into
14 all of the different information and try and remove
15 ambiguities in the part of the process that we could.
16 There is no -- there is very -- there is very few
17 absolutes. That's the best way of describing it.
18 There is a lot of effort, consideration, and judgment
19 that has to go into play, and there is a lot of
20 collegial dialogue to make sure that things are
21 considered properly.
22 JUDGE TRIKOUROS: Okay. Thank you.
23 BY MR. GHASEMIAN:
24 Q Now, I have page 39 of the enforcement
25 policy on the screen. And I'm referring to a section

1 with the heading "Section 8, Enforcement Actions
2 Involving Individuals." Is this the section that
3 deals with taking enforcement actions against
4 individuals?
5 A Yes, it does.
6 Q Now, reading into the first paragraph, it
7 refers to licensed and non-licensed individuals.
8 What's the difference?
9 A Generally, licensed individuals we can
10 take enforcement actions against their specific
11 license, and they are considered for the full range of
12 activities. Non-licensed individuals, deliberate
13 misconduct is our primary aspect.
14 Q So could you explain that, elaborate on
15 that?
16 A Well, for a licensed individuals, they
17 carry an NRC license, and we can take the full range
18 of activities against them -- a notice of violation
19 for all sorts of different types of NRC requirements.
20 For a non-licensed individual, we are limited to the
21 deliberate misconduct rule.
22 Q So they have to engage in deliberate
23 misconduct before action is taken directly against
24 them, is that --
25 A That's correct.

1 Q Now, referring to the first sentence of
2 the second paragraph --
3 JUDGE FARRAR: Hold on. Is Mr. Geisen
4 licensed? Then, was he licensed?
5 THE WITNESS: I do not have firsthand
6 personal knowledge of that. Based upon my listening
7 to his testimony, Your Honor, I would indicate no, he
8 does not have a license, but I would check with my
9 Licensing staff in Region III to be positive of that.
10 JUDGE FARRAR: But the people in the --
11 the reactor operators, they are -- the people in the
12 control room, they are licensed?
13 THE WITNESS: We license -- yes, that's
14 correct. We license control room operators and senior
15 reactor -- excuse me. We license reactor operators
16 and senior reactor operators.
17 JUDGE FARRAR: Okay. So even though FENOC
18 has a license for the facility, that doesn't mean that
19 all of their nuclear engineers working onsite are
20 themselves licensed.
21 THE WITNESS: That is correct.
22 JUDGE FARRAR: Okay.
23 BY MR. GHASEMIAN:
24 Q In 2006, was Mr. Geisen considered to be
25 a licensed individual or a non-licensed individual?

1 A A non-licensed individual.

2 Q Now, referring to the first sentence of

3 the second paragraph, it talks about lying to the NRC

4 as a more serious violation. And I'm kind of

5 paraphrasing this sentence. Why is lying to the NRC

6 a more serious violation?

7 A The NRC relies upon the industry to

8 provide -- and individuals that work within this

9 industry to provide complete and accurate information

10 at all times. Our inspection program is one of a

11 sampling nature. Our activities are one where we

12 observe activities on a periodic basis, not all

13 activities.

14 We exclusively rely -- I mean, not

15 exclusively, we especially rely upon licensee staff to

16 be forthright at all times in all matters, even when

17 those matters are not to their advantage, to ensure

18 the public health and safety. And so an individual

19 lying to the agency is a very, very serious issue.

20 Q I'm scrolling down to page 41. I'm going

21 to refer you to the last paragraph. And I guess it

22 spills into the top of the following page, on page 42.

23 It deals with sanctions that are available or that are

24 -- that may be imposed in orders. Could you summarize

25 what that paragraph and the three bullet points say?

1 A I didn't hear you completely. Could you
2 repeat that?
3 Q I'm referring you to the paragraph at the
4 bottom of page 41, going -- continuing on to the top
5 of page 42. And it deals with sanctions that are
6 available or that may be imposed in orders. Could you
7 summarize that paragraph?
8 A In general, for actions we take against
9 individuals, we take those actions via orders. And
10 for an unlicensed individual, we'd issue an order that
11 could prohibit involvement in NRC activities for a
12 period of time, could require them to make
13 notifications to the agency upon reemployment, or
14 could limit activities during those employments also.
15 Q Now, going back to on the top -- on top of
16 page --
17 JUDGE FARRAR: What do you mean by "limit
18 activities in their employment"? Yes, I know what you
19 mean, but -- I know what you said, but give me some
20 examples.
21 THE WITNESS: For example, we could limit
22 an individual to not being a supervisor. We could
23 limit an individual -- and we do this sometimes not
24 because of wrongdoing or other actions, but we may
25 limit a reactor operator, for example, in their

1 license to only being able to do activities when
2 they're accompanied, because of a medical issue, for
3 example. We could put specific limitations to ensure
4 the public health and safety.
5 JUDGE FARRAR: Could you limit a person to
6 not being involved in any communication with the NRC?
7 And move a little closer to the microphone, if you
8 would, or pull it forward. You know, say, okay, this
9 fellow is a little shaky, we're not sure, so we want
10 to make sure he can do his job. But anything that the
11 company submits information to the NRC, we don't want
12 him involved directly or indirectly in furnishing us
13 information. Is that a thing that could be done?
14 THE WITNESS: I believe the answer to that
15 is yes, Your Honor.
16 JUDGE FARRAR: Are you aware of that --
17 something like that being done without something more
18 on top of it?
19 THE WITNESS: I can't recall a case
20 specifically off the top of my head, no.
21 JUDGE FARRAR: Okay. Go ahead, Mr.
22 Ghasemian.
23 MR. GHASEMIAN: Thank you, Your Honor.
24 BY MR. GHASEMIAN:
25 Q I'm going to scroll back up to the top of

1 page 41 of the policy, and there is a list of nine
2 factors. What's the purpose of these factors?
3 A These are factors when we decide to take
4 an action, or propose to take an action against an
5 individual, that we utilize to form the basis for
6 discussion of what the appropriate action is.
7 Q Is this an exclusive list?
8 A No, it's not. It's just a list of factors
9 we will consider. There are additional factors that
10 could come into play that may be associated with a
11 particular example. As I said earlier, every case is
12 case by case. So there may be a unique factor to a
13 particular case that rises to the level that we will
14 propose it for consideration as a part of our
15 decisionmaking.
16 JUDGE FARRAR: Mr. Ghasemian, I'm sorry.
17 I was talking to Joanna. I missed the preface to that
18 question. What list are you referring to?
19 MR. GHASEMIAN: The list on top of
20 page 41, Your Honor.
21 JUDGE FARRAR: 41. Okay, fine. Thank
22 you.
23 BY MR. GHASEMIAN:
24 Q From this list, are any of the factors
25 more or less important than the others?

1 A They are taken collectively. However, one
2 factor could dominate the discussion, depending upon
3 its significance.
4 Q So what are examples, some other factors
5 that may be used that are not necessarily listed on
6 here?
7 A You can look at the underlying violation
8 associated with the incomplete or inaccurate
9 information about an individual or the wrongdoing that
10 was involved. You could look at the repetitiveness --
11 in other words, if it occurred over and over and over
12 again. You could look at the length of time that was
13 involved in the violation and the opportunities for
14 the individual to correct it. Things of that nature.
15 JUDGE TRIKOUROS: What does that first one
16 mean, the level of the individual within the
17 organization? I mean, I know what it means literally,
18 but how was that interpreted?
19 THE WITNESS: We would tend to place a
20 higher level of responsibility, and, therefore,
21 accountability on somebody as they move up in the
22 organization, in part because they have the
23 opportunity -- they have a higher level of
24 responsibility, obviously, but they also have the
25 opportunity to influence others and to change the ways

1 others view their need to or their requirement to
2 comply with NRC requirements.
3 So if you had, for example, a first-line
4 supervisor who has a few people under them and has a
5 few people that they influence, you would have one
6 potential perspective for the exact same type of issue
7 as if you had a design manager or a higher manager
8 with many more people under them and had a larger
9 opportunity to influence.
10 Also, usually -- not always, but usually,
11 as you go up the line, you have a larger opportunity
12 to influence the agency, because you have more and
13 more involvement with the agency.
14 JUDGE TRIKOUROS: Does the upper level
15 person have to be found to have a direct knowledge?
16 In other words, what if a manager in the nuclear
17 industry basically goes around threatening people with
18 their jobs on a routine basis if they don't satisfy
19 him easily, and as a result you see actions occurring
20 from subordinates that -- in order to possibly protect
21 their jobs? Do you -- is that sort of thing
22 considered, or is that -- does it have to be some
23 direct connection communication or, you know, a signed
24 letter or something?
25 THE WITNESS: We would take into

1 consideration every piece of information we could. So
2 if there were pieces of information that might imply
3 in a particular case that there was very significant
4 management involvement that caused an individual to
5 take a specific action in a specific manner, and we
6 could demonstrate that, we would take that into
7 consideration.
8 JUDGE FARRAR: So would that tend to
9 exonerate -- sorry, not exonerate -- mitigate the
10 action -- and we're speaking generally here, not the
11 -- you know, we'll get to this case soon enough. But
12 would that tend to mitigate what you would do to the
13 lower level person?
14 THE WITNESS: It could.
15 JUDGE FARRAR: Would it exacerbate what
16 you would do to the higher level person?
17 THE WITNESS: The two cases would be
18 handled separately, sir.
19 JUDGE FARRAR: But consistently not in
20 terms of penalty, but consistently in terms of you'd
21 like to be able to explain why you took certain action
22 against Mr. Small and different action against Mr. Big
23 THE WITNESS: Well, one of the goals, or
24 a couple of the goals, of the NRC's enforcement policy
25 is to be predictable and to be repeatable. One of the

1 things that I've identified throughout my career that
2 I find a great advantage to the NRC is if you give the
3 same set of facts to any NRC inspectors in general you
4 will end up with very close to the same answer.
5 We try and implement the enforcement
6 policy in that exact same manner, so that if you give
7 the same set of facts to a number of different people
8 with an enforcement background you should come up with
9 the same answer. So we try to ensure that, and that's
10 one of the things we're trying to accomplish with this
11 effort.
12 JUDGE FARRAR: Okay. Tell me again -- I
13 was listening to the -- your biographical background
14 -- how long have you been in the position where you
15 are writing -- where you are in the decisionmaking
16 process as to enforcement orders?
17 THE WITNESS: Approximately four years,
18 sir.
19 JUDGE FARRAR: Okay.
20 THE WITNESS: But I've been doing
21 enforcement my entire career. As an inspector with
22 the NRC -- and I sit on many oral boards for our
23 inspectors -- we require them to have a fundamental
24 knowledge.
25 JUDGE FARRAR: But as to you -- you being

1 in the decisionmaking chain, not the fact-finding
2 chain but the decisionmaking chain for enforcement
3 orders, that's four years.
4 THE WITNESS: Yes.
5 JUDGE FARRAR: Okay. Thank you.
6 JUDGE TRIKOUROS: Just one more variation.
7 How is ignorance of something treated in terms of
8 someone indicating they simply didn't know that
9 something was going on or that sort of thing? Do you
10 -- is -- how do you treat that? Is this on an
11 individual basis you're looking at it? Or is
12 ignorance considered a defense, so to speak?
13 THE WITNESS: We try to evaluate all of
14 the factors that come into play. If you're looking at
15 the deliberate misconduct rule, you would have to know
16 that the actions that you are taking are -- you have
17 to know the information associated with the actions,
18 and you'd have to take an action to willfully,
19 deliberately, go contrary to that. So if, in a
20 hypothetical case, you were trying -- not -- that is
21 the way the process works.
22 JUDGE TRIKOUROS: So if an upper level
23 manager, director, vice president, were just not
24 paying attention to his organization, a lot of things
25 were going on in that organization that were not very

1 good. But he really didn't know what was going on,
2 because he really wasn't paying attention. Is that --
3 does that have any bearing?
4 THE WITNESS: It would appear you would
5 fail, in that particular case, one of the two
6 requirements for a deliberate violation.
7 JUDGE HAWKENS: Can you -- going to the
8 first paragraph of the Chapter 8 or Section 8, it
9 talks about knowing or should have known, and then
10 knowingly or with careless disregard failed to take
11 required actions. So in the situation that Judge
12 Trikouros was talking about, although the argument may
13 be I did not knowingly -- can you attribute knowledge
14 -- in other words, does it have to be knowing or can
15 it be, as this says, with a careless disregard, but
16 more than negligence?
17 THE WITNESS: I'm not sure I understood
18 the question, Your Honor.
19 JUDGE HAWKENS: Well, let's go back to
20 Judge Trikouros' hypothetical. An individual -- there
21 was things going on that he legitimately did not focus
22 on, did not know about, and, therefore, made a
23 submission to the NRC which was incorrect.
24 Could you find that there was deliberate
25 misconduct on the theory that it was a careless

1 disregard of what his responsibilities were and the
2 careless disregard in the execution of his
3 responsibilities? Or would you say that he could not
4 be sanctioned under this enforcement policy because
5 the element of actual knowledge was missing?
6 THE WITNESS: My initial inclination would
7 be to indicate the element of actual knowledge is
8 missing. It's important to be aware that this process
9 is one that involves a large number of people with
10 very specific knowledge in enforcement, and the legal
11 staff, and we would go through this and walk our way
12 through this. If I had a question in that specific
13 area, I would engage my Office of General Counsel and
14 ask them for additional guidance and perspective in
15 that area. That's not a decision I have individual
16 authority to make.
17 JUDGE FARRAR: Ms. Clark, this would --
18 and Mr. Hibey, Mr. Wise, this may be a subject of
19 briefing, because regardless of what it says in the
20 enforcement policy that Judge Hawkens referred to, I
21 thought we had been told earlier by the Staff in the
22 collateral estoppel brief that the Staff concedes that
23 actual knowledge is the test in this case, which would
24 be consistent with 50.5(a)(2) of the regulations?
25 MS. CLARK: Yes, that's correct.

1 JUDGE FARRAR: Okay. Thank you. So we
2 don't need briefing on that.
3 MS. CLARK: Yes, that's our position.
4 THE WITNESS: I apologize if I wasn't
5 clear, Judge. I said if I had a question, I would
6 ask.
7 JUDGE FARRAR: No, no. I was not -- I was
8 not challenging -- questioning the legitimacy of your
9 answer. Your answer was fine. I just wanted to make
10 -- just wanted to make sure if, based on the portion
11 of the enforcement policy that Judge Hawkens referred
12 to, whether that created an issue for us or not. His
13 question was legitimate, your answer was legitimate,
14 and that led us to: where does that leave us? So I
15 think we just got the answer to where it leads us.
16 JUDGE TRIKOUROS: And I just have another
17 question.
18 JUDGE FARRAR: Sure. And if his question
19 wasn't legitimate, I wouldn't say it wasn't
20 legitimate.
21 (Laughter.)
22 THE WITNESS: I appreciate that, sir.
23 JUDGE TRIKOUROS: A submittal is made to
24 the NRC. There are certain -- there are certain
25 signatures that take place within an organization.

1 One of those signatures is a vice president signing
2 under oath that, to the best of his, you know, belief,
3 information, and knowledge that the information is
4 correct. Is there a significance placed on the
5 signature under oath that makes it different than a
6 signature on, say, an internal approval sheet? Or do
7 you just assume they're the same?
8 THE WITNESS: You're asking a question
9 beyond my knowledge base, Your Honor.
10 JUDGE TRIKOUROS: Thank you.
11 JUDGE FARRAR: This may be something to
12 brief, because that question has in it the kind of
13 Sarbanes-Oxley thought, of which I'm only remotely
14 familiar, but I thought the Sarbanes-Oxley Act was
15 passed because we didn't want CEOs filing financial
16 documents and saying, "Oh, gee, I didn't know. You
17 know, I asked my CFO, I asked the accountant, and they
18 said it was fine." If I remember what Sarbanes-Oxley
19 does, it says the CEO or somebody at that level files
20 financial statements under oath, and that is different
21 from a green sheet.
22 If I can use the analogy, that is
23 different from a green sheet, and that person is
24 personally responsible. So you tie that in with Judge
25 Trikouros' question that here the submissions were

1 made under oath, and so we'll want briefing on the
2 Sarbanes-Oxley analogy to that. And I'd cite you the
3 U.S. Code section of Sarbanes-Oxley, but, of course,
4 I have no idea what it is.
5 Go ahead, Mr. Ghasemian.
6 MR. GHASEMIAN: Thank you, Your Honor.
7 BY MR. GHASEMIAN:
8 Q For the NRC to conclude that an individual
9 has engaged in deliberate misconduct, what is the --
10 MR. HIBEY: In what kind of conduct?
11 MR. GHASEMIAN: Deliberate misconduct.
12 Excuse me.
13 BY MR. GHASEMIAN:
14 Q For an individual to have engaged in
15 deliberate misconduct, what is the state of mind of
16 the person that we need? What is the standard that we
17 need to reach? Is it careless disregard or negligence
18 or actual knowledge?
19 A They had to have actual knowledge of the
20 information that they took a contrary action to.
21 Q So would we take action if the NRC thought
22 that the person engaged in careless disregard?
23 A Again, as I indicated earlier, I'd go back
24 and refresh my memory specifically relative to those
25 terms in the enforcement manual. It has got to be

1 more than mere negligence. Careless disregard is a
2 willful violation, if I'm quoting correctly, and
3 deliberate is had the actual knowledge and took action
4 against it. So for a deliberate violation, you'd have
5 to have a deliberate action.
6 Q Now, going back to page 41, I think it was
7 list of the nine factors. I think it's -- can you see
8 it on your monitor?
9 A I can see it out there.
10 Q Is an individual's work performance
11 history a factor when considering to take the
12 enforcement action against an individual?
13 A No.
14 Q How about an individual's military
15 service?
16 A No.
17 JUDGE FARRAR: Hold on. When you ask
18 that, could you ask it in two parts? In terms of
19 whether you issue an enforcement -- three parts. No,
20 two parts. Whether you issue an enforcement order
21 against someone at all, and then, second, what the
22 sanction is in that enforcement order.
23 In other words, just like we're treating
24 this case in two parts, was Mr. Geisen guilty, as
25 charged? And if -- and the second question is: if

1 guilty as charged, what is the remedy we need to
2 impose to protect the public health and safety?
3 So if you'd go back and start those
4 questions again, I'd like to know the answer to both
5 of those.
6 MR. GHASEMIAN: Yes, Your Honor.
7 BY MR. GHASEMIAN:
8 Q When we were talking about just the
9 violation, to conclude whether there was a violation,
10 is an individual's work performance history a factor
11 in determining whether that person violated an NRC
12 rule?
13 A No.
14 Q And why not?
15 JUDGE FARRAR: That's fine.
16 MR. GHASEMIAN: That's fine?
17 BY MR. GHASEMIAN:
18 Q Now, as far as the sanction that is
19 imposed on the individual that the NRC has determined
20 to have deliberately violated an NRC rule, is that
21 individual's work performance history a factor in
22 determining what sanction that should be imposed for
23 that -- for a particular violation?
24 A No.
25 Q And why not?

1 A It doesn't come into play in terms of the
2 things that we would consider. They could have been
3 a stellar performer for the last 20 years in terms of
4 their work activities, but that doesn't directly
5 relate to the NRC's assurance of public health and
6 safety.
7 JUDGE FARRAR: Is there any element in the
8 sanction of, if you want to protect the public health
9 and safety, where does rehabilitation come in? And
10 let me tell you where I'm going, so you're not
11 trapped.
12 THE WITNESS: Thank you, Your Honor.
13 JUDGE FARRAR: If you don't take into
14 account work history, and if a violation is a
15 violation, then in theory every ban should be a
16 lifetime ban. We don't -- are you aware of anyone who
17 is in a significant position who has been banned for
18 life?
19 THE WITNESS: Since our discussions
20 yesterday, yes, I am, Your Honor.
21 JUDGE FARRAR: Good, okay. We'll get to
22 that. But some people are not banned for life.
23 THE WITNESS: That is correct.
24 JUDGE FARRAR: So is work history and all
25 the other things Mr. Ghasemian is going to get to, are

1 they -- they are not considered in the length of the
2 ban?
3 THE WITNESS: No, sir.
4 JUDGE FARRAR: Okay. We'll have to
5 explore that answer at greater length. Mr. Miller and
6 Mr. Moffitt -- this Board signed orders a couple of
7 years ago. They each got five-year bans. And as to
8 one of them, we were told that, because of what
9 happened afterwards, you no longer had a concern about
10 the reliability and trustworthiness of Mr. Miller.
11 How do you make that determination? And how -- let's
12 get right to the point. How would we get to that
13 determination about Mr. Geisen, if we get to that
14 point?
15 THE WITNESS: Let me make sure I
16 understand the question you're asking me.
17 JUDGE FARRAR: Why? Just because it was
18 six parts? Why would that trouble you?
19 THE WITNESS: You're asking, how do we
20 make the determination of whether or not an individual
21 can be considered trustworthy and reliable in the
22 future?
23 JUDGE FARRAR: Right. Because it's kind
24 of like, okay, so every five years you're back, great.
25 That doesn't strike me necessarily follows. With

1 Miller you said you had done some things, and so a
2 year, whatever it was, was fine. How you do that, and
3 if you do it, why is that not something you consider
4 at the beginning in the length of the sanction? Why
5 doesn't it depend on when you think -- based on the
6 person's entire life, when you think that person will
7 be rehabilitated?
8 That's a multi-part question, but just
9 don't try to answer the specific question, just tell
10 me what your thoughts are on that whole line of
11 thinking.
12 THE WITNESS: A couple of things to start
13 off with. So I may give you a multi-part answer.
14 JUDGE FARRAR: That's fine.
15 THE WITNESS: The decisionmaking is a
16 collaborative one, a collegial one. So we try and
17 look at it holistically, with all of the individuals
18 involved in the process to make sure we're
19 comprehensive and we're consistent. When we look at
20 an individual action, it's a very serious action for
21 us. It is extremely serious for us.
22 And so we look at all of the factors that
23 we think are important for us to help ensure that we
24 are accomplishing our mission of deterring non-
25 compliance. And "sending the right message" is a

1 phrase that you will often hear to make sure that the
2 rest of the industry understands that.
3 JUDGE FARRAR: And my question in no way
4 is meant to challenge that philosophy, that your job
5 is to do that.
6 THE WITNESS: In trying to discern whether
7 or not or what the length of the -- the ban, for
8 example, if there is a ban, we'll look at the nine
9 factors that are there. We'll look at nearly anything
10 and everything that we think will help us to reach a
11 good decision.
12 Normally, we don't -- and I say "normally"
13 because there is no absolutes here. Normally, we
14 don't look at an individual's work performance as a
15 factor in that. The person's, individual's,
16 performance as it relates to the violations in front
17 of us usually provides us a very significant amount of
18 information regarding their willingness, their desire,
19 and their potential future intent to comply with NRC
20 requirements. And that's what we're trying to
21 accomplish.
22 So we're trying to understand, and it's a
23 very difficult process -- to understand from the
24 information we have in front of us what the
25 perspective is regarding that individual, that

1 individual's performance, what that performance tells
2 us, and what that may mean in the future.
3 So for an individual that -- and I'm
4 thinking of a specific case in my mind, where they did
5 a wrongdoing act, and they were very -- very contrite,
6 they were very acknowledging of the fact that they did
7 it wrong and they used the wrong set of criteria to
8 make their decision, and they fully appreciate it now.
9 And they took actions to assure the agency in the
10 future that that wouldn't occur, and they took actions
11 to make sure others would be aware of their errors in
12 judgment and how they got there.
13 Those are all factors for us to take into
14 consideration in trying to reach a judgment as to what
15 the right actions should be, both for the individual
16 and to ensure the community as a whole understood the
17 importance of complying with NRC regulations and
18 rules.
19 I'm not sure I gave you a very specific
20 answer, Your Honor, but it's a case-by-case
21 perspective, and we try and take into consideration
22 all of the different factors. And it's a very
23 deliberative process. I don't think anybody in the
24 NRC takes it lightly when we take an individual
25 action, because it affects people.

1 JUDGE FARRAR: Okay. I appreciate your
2 answer. I'm sure we will come back to it. Tell me --
3 you used the collective "we." Tell me in this case
4 who is "we." When you sat down in the office -- you
5 weren't involved in the investigation itself, were
6 you? Or were you?
7 THE WITNESS: No, sir, I was not.
8 JUDGE FARRAR: So at some point the Office
9 of Investigations' report comes up to you all. And
10 tell me how the -- who generates a recommendation.
11 How does it move up the chain? I think Mr. Virgilio,
12 who is an assistant or EDO or something --
13 THE WITNESS: He's a Deputy Executive
14 Director for -- he's a Deputy Executive Director.
15 JUDGE FARRAR: Okay. So he is right under
16 the top staff boss.
17 THE WITNESS: That's correct. He reports
18 to --
19 JUDGE FARRAR: Okay. How --
20 THE WITNESS: -- Bill Borchardt.
21 JUDGE FARRAR: How did it get from
22 wherever it started up to him?
23 THE WITNESS: I'd be glad to, Your Honor.
24 Generically -- I'll speak generically to the process,
25 because it's probably easier. When the Office of

1 Investigations finishes its inspection -- its
2 evaluation of a particular issue, they provide a
3 report to my office in Region III, for example, or to
4 the other regional offices that it's there, regarding
5 their findings.
6 And generally their findings include their
7 perspective as to the conclusions of those findings.
8 We will take that information and we -- my office, my
9 staff, will review it, and we will also provide it to
10 the technical staff for their review.
11 They are reviewed for two purposes -- one,
12 to make sure there aren't any other new or different
13 safety issues that we haven't previously identified
14 that we need to address, and, secondly, to determine
15 whether or not any enforcement action should be taken.
16 I should say at the same time the report is also
17 provided to our Office of General Counsel.
18 JUDGE FARRAR: Here.
19 THE WITNESS: Yes. We will go through --
20 "we" being the Region III staff in this particular
21 case. And I'll speak "we" in terms of regional
22 activity, because it's easier for me to recognize
23 that. We will go through and evaluate the report,
24 evaluate the information, and with the Technical
25 Division develop what would be called an Enforcement

1 Panel Worksheet.

2 The Enforcement Panel Worksheet would lay
3 out the factors for those individuals that we propose
4 to take an action against. And we'll discuss that
5 with the region, with the technical staff in the
6 region, within my office, within the management within
7 the region, with the Office of General Counsel, and
8 with the Office of Enforcement, to make sure --

9 JUDGE FARRAR: Office of Enforcement here
10 at headquarters?

11 THE WITNESS: Right. The Office of
12 Enforcement --

13 JUDGE FARRAR: Who heads that?

14 THE WITNESS: The Office of Enforcement is
15 headed by Cindy Carpenter. We'll walk through those
16 pieces as we develop the process. In the Office of
17 General Counsel, we're looking for guidance and
18 information to ensure that we have sufficient evidence
19 to support whatever call the staff is making.

20 They work somewhat independently, but they
21 come together. So the staff may believe -- the Office
22 of Investigation may propose that there is sufficient
23 evidence, the staff may believe there is sufficient
24 evidence, and the Office of General Counsel may
25 believe there is not sufficient evidence. It also can

1 work the other way.

2 We'll then take that information and we'll

3 conduct an enforcement panel. During the enforcement

4 panel, you'll have a number of members of the regional

5 management staff and the headquarters staff --

6 JUDGE FARRAR: Slow down, slow down. On

7 the enforcement panel, you'll have whom?

8 THE WITNESS: It's an oral board question

9 that I normally ask inspectors. At the enforcement

10 panel, you normally will have -- you may have the

11 Deputy Regional Administrator, you normally will also

12 have --

13 JUDGE FARRAR: Slow, slow.

14 THE WITNESS: I apologize.

15 JUDGE FARRAR: Okay. Deputy Regional

16 Administrator --

17 THE WITNESS: I'm trying.

18 (Laughter.)

19 You'll normally have the Deputy Regional

20 Administrator, the Division Director for the

21 responsible division -- that's an SES member --

22 JUDGE FARRAR: Headquarters person.

23 THE WITNESS: No. This is still in the

24 region. I'll get to headquarters in a moment.

25 JUDGE FARRAR: Okay. Okay.

1 THE WITNESS: This is all in the region
2 itself.
3 JUDGE FARRAR: Okay.
4 THE WITNESS: You'll have the Division
5 Director for the responsible -- the Technical
6 Division, you'll have the Branch Chief responsible for
7 the specific subject matter area, or, if it's a
8 reactor, for example, you'll also have the Reactor
9 Branch Chief responsible for project oversight of the
10 activities.
11 You'll have the responsible inspector, if
12 there's an inspector for the specific subject matter
13 area. You'll have the Office of Investigations
14 Director in the region, and potentially, and quite
15 often, the investigators that are associated with a
16 particular investigation.
17 JUDGE FARRAR: How about the resident
18 inspector for the facility?
19 THE WITNESS: Not necessarily.
20 JUDGE FARRAR: Was he involved in this
21 one?
22 THE WITNESS: Was he involved in this one?
23 I can't speak to that first hand, Your Honor.
24 JUDGE FARRAR: Okay. Can you --
25 THE WITNESS: In terms of the

1 investigation --

2 JUDGE FARRAR: Can you find out before you

3 leave town or --

4 THE WITNESS: If you may give me half a

5 moment --

6 JUDGE FARRAR: Yes.

7 MR. GHASEMIAN: Your Honor, the strategy

8 forms that have been provided yesterday that defense

9 counsel already had from Mr. Geisen, there is a list

10 of individuals that it is indicated that were on the

11 panel. So we can just look at that sheet, and it will

12 indicate who the individuals were.

13 JUDGE FARRAR: Who was the resident

14 inspector at the time, do you recall?

15 THE WITNESS: No, sir, I do not recall.

16 JUDGE FARRAR: Okay. Then, why don't --

17 if we -- it doesn't have to be right this minute.

18 Before Mr. O'Brien leaves, let's show him that sheet,

19 and he can look at the names and that will refresh his

20 recollection. But that's not central to this line of

21 questioning, so let's keep going. You were telling me

22 who is on the panel.

23 THE WITNESS: Yes. I was just -- I was

24 actually working my way around the table. So I'm

25 trying to remember where on the table I was. I

1 believe I said the inspector that was involved. Then,
2 you'd have the Office of Investigations, normally the
3 Field Office Director, and often the investigator that
4 may have been involved, although there's a uniqueness
5 here, Your Honor, in this case.
6 MR. HIBEY: I didn't hear the answer to
7 that -- that last sentence. If you could --
8 THE WITNESS: I said I'm -- I'll try and
9 enunciate a little better.
10 MR. HIBEY: Please.
11 JUDGE FARRAR: Can you get the mic -- yes,
12 a little -- and lean into it a little.
13 THE WITNESS: I said there was a
14 uniqueness in this particular case regarding the
15 involvement of OI, the Office of Investigation. And
16 then, the --
17 JUDGE FARRAR: Meaning they are not
18 usually involved?
19 THE WITNESS: No. They normally are
20 involved and do attend any enforcement panel that
21 involves an Office of Investigation case, yes.
22 JUDGE FARRAR: What was unique about this
23 case?
24 THE WITNESS: In this particular case, the
25 three investigators that were a part of the Office of

1 Investigation activity were a part of the Department
2 of Justice's activities. So they would not be able to
3 participate because of the limitations, as I
4 understand it -- and I don't know this for a fact --
5 but on limitations placed upon them by the Department
6 of Justice.
7 JUDGE FARRAR: So these were the people
8 who had done all of the interviews. These people who
9 were excluded were the people who had done all of the
10 interviews.
11 THE WITNESS: I'm not sure they were
12 specifically -- we did not exclude them, Your Honor.
13 JUDGE FARRAR: No, no. The Department of
14 Justice excluded them.
15 THE WITNESS: My understanding is they
16 were not allowed to participate, and my understanding
17 is that there was a person in their stead that
18 participated.
19 JUDGE FARRAR: But they were the people
20 who had done the interviews.
21 THE WITNESS: That is my understanding,
22 yes.
23 JUDGE FARRAR: So the people sitting
24 around your table drafting up this order had never
25 first hand talked to any of the people involved.

1 THE WITNESS: If I can make a couple of
2 corrections?
3 JUDGE FARRAR: Sure.
4 THE WITNESS: The panel is not for the
5 purpose of drafting up the order. The panel is for
6 the purpose of determining whether or not we will or
7 won't take an action.
8 JUDGE FARRAR: Right.
9 THE WITNESS: So that's a later activity.
10 As to your statement, the people that did the
11 firsthand interviews, did they participate in the
12 panel? I believe it would be safe to say no. That
13 does not mean that the staff around the table did not
14 have the opportunity to review all of the transcripts
15 associated with those activities.
16 JUDGE FARRAR: Go ahead.
17 THE WITNESS: Thank you, Your Honor. I
18 have covered the people that are primarily and
19 normally involved in the region. Also, when we have
20 the enforcement panels, we have headquarters on the
21 teleconference.
22 And at headquarters I will normally have
23 a member of the Office of Enforcement staff, a manager
24 from the Office of Enforcement -- that may be the
25 Branch Chief that oversees enforcement activities, it

1 may be the Deputy Division -- the Deputy Director for
2 the office, it may be the Director for the office, and
3 then I'll also have the Office of General Counsel from
4 headquarters on the telephone.
5 And often -- and this happened -- we'll
6 have somebody from the Office of Investigations on the
7 telephone from headquarters also.
8 JUDGE FARRAR: Now, do you have one of
9 these panels meet one at a time for each of the people
10 charged and not charged? Or do you say, "This is the
11 Davis-Besse panel, we've got 12 possible suspects
12 here, let's run down the line"?
13 THE WITNESS: Our normal course of
14 business is to have a panel -- for example,
15 Region III, we have a panel every Thursday at
16 9:00 a.m. We will propose the cases to be discussed
17 at a panel the week before, and we'll provide the
18 information to the involved parties the week before or
19 no later than usually Monday morning for them to
20 review prior to the panel. We would generally try to
21 group related issues at the same panel, yes.
22 JUDGE FARRAR: You may not handle them at
23 one meeting, there being so many suspects here. But
24 you would -- you would be grouping them as you are
25 talking to them.

1 THE WITNESS: That would be our intent,
2 yes, Your Honor.
3 JUDGE FARRAR: For example, you could say,
4 "Well, we've got Mr. Geisen, and Mr. Swim reported to
5 him, and he reported to Mr. Moffitt," and so you might
6 talk about them all together, or you might not.
7 THE WITNESS: We would tend to try and
8 group individuals or actions that are interrelated,
9 yes.
10 JUDGE FARRAR: Okay.
11 JUDGE TRIKOUROS: The NRC expects honesty
12 of the industry, because you can't do your job unless
13 you're getting accurate information. If you were to,
14 by independent means, find something, you would still
15 take action against the industry for not being the one
16 that gave you that information.
17 And vice presidents within an organization
18 expect their managers to be honest with them, so that
19 they can make the right decisions and do their job.
20 Managers within the organization expect their
21 subordinates to give them honest information, so that
22 they can make the right decisions and do their job.
23 And I think that's a given.
24 So if you're in an enforcement situation
25 against a manager, specifically in this case Mr.

1 Geisen, where subordinates were clearly providing
2 either inaccurate information or not providing any
3 information at all, hiding information, and you find
4 that there is some link that -- some document that you
5 could attribute to Mr. Geisen that indicated to you,
6 gee, he should have known what the truth was, going
7 totally around his subordinates, ignoring them, just
8 going -- finding it on his own, and you, in your
9 enforcement considerations, make the determination
10 that he should have made that connection, he should
11 have known without the accurate information of his
12 subordinates, without the honesty of his subordinates,
13 that -- what the truth was, and, therefore, Mr. Geisen
14 gets punished.
15 That's basically what we have here, isn't
16 it? And yet -- and yet there might be other
17 situations where managers have accurate information,
18 and they themselves are deceptive, and they themselves
19 are -- you know, are culpable in some manner. But
20 under those two conditions, it seems to me the
21 punishment is the same. Am I incorrect in that
22 assumption?
23 THE WITNESS: There were a lot of parts to
24 your approach. There were a lot of assumptions in
25 your approach. I'd have to address them individually

1 to try and answer them, and it would be actually much
2 easier if I had them in front of me, so that I could
3 walk my way through them.
4 One of the things that stuck out in my
5 listening to your points that you made right there was
6 that the individual has to have knowledge. That's one
7 of the criteria. They have to have knowledge. If the
8 individual does not have knowledge, and I can't
9 demonstrate that they have that knowledge, I don't
10 meet the first of the two pieces to move forward for
11 a deliberate misconduct.
12 So if I can't prove that an individual had
13 knowledge, I can't go forward. At least I wouldn't
14 propose it.
15 JUDGE TRIKOUROS: Well, sitting on this
16 end of the room, I can tell you that proving knowledge
17 is not the easiest job in the world. You almost have
18 to infer knowledge. It's not that -- there are
19 circumstances where it's obvious, but often not.
20 THE WITNESS: I'd offer --
21 JUDGE TRIKOUROS: You heard all the
22 testimony for the last week.
23 THE WITNESS: Yes, I did. Well, I heard
24 -- I apologize, I responded too quickly. I heard Mr.
25 Geisen's testimony. That's the only testimony I've

1 heard.

2 JUDGE FARRAR: Did you hear the testimony

3 -- I think I'm -- no, you didn't hear it. I think --

4 and counsel can correct me if I'm wrong -- that Mr.

5 Goyal testified that Mr. -- when he was trying to do

6 the right -- I'm paraphrasing -- when he was trying to

7 do the right thing, Mr. Cook and Mr. Siemaszko came to

8 him and convinced him not to do the right thing.

9 You all brought charges against Mr. Goyal.

10 You didn't bring charges against Mr. Cook. Did you

11 know when you were considering Mr. Cook that he had

12 gone, according to Mr. Goyal and according to my

13 memory, that he had gone to Mr. Goyal and said, "We

14 don't care what you think. You may be right, but

15 we've got to lie about this"? That's a gross

16 characterization. Did you know that?

17 THE WITNESS: No, sir.

18 JUDGE FARRAR: Would that have changed

19 your approach in terms of going after Mr. Cook?

20 THE WITNESS: It may have. I can -- I

21 want to respond, if you'd like me to. Otherwise, I

22 don't have to.

23 JUDGE FARRAR: No, go --

24 THE WITNESS: To the previous dialogue.

25 JUDGE FARRAR: I'm sorry. I thought you

1 were -- I would not have interrupted. I thought you
2 were finished. Go ahead.
3 THE WITNESS: I can't infer specifically
4 knowledge generically. It takes a lot to get there.
5 So I would have to have information that demonstrated
6 to me that somebody had the knowledge. Because of the
7 consequences of taking individual actions, we try to
8 be as careful as we possibly can to make sure that we
9 are not taking just the perspective of, well, there's
10 no way they couldn't have known. We don't approach it
11 that way.
12 In regard to Mr. Cook, I did not have that
13 knowledge when we went forward, that I am aware of,
14 that I recall.
15 JUDGE TRIKOUROS: Well, would you consider
16 that a signature on a document that carries --
17 possibly a 10-page document, let's say, that carries
18 with it a sentence that has important implications to
19 something that occurs two or three months down the
20 road, would you consider the signature on that
21 document that contained that sentence absolute
22 knowledge?
23 THE WITNESS: There are a number of things
24 that we would take into consideration. I'd have to
25 look at the specifics of the case to be able to truly

1 give you an answer of that. I don't know that I can
2 answer it broadly and generically. I apologize.
3 JUDGE FARRAR: All right. Then, let's
4 make it really specific. The June 27th -- and I won't
5 ask you to -- well, I'll make the question real
6 simple. Instead of saying --
7 THE WITNESS: Thank you.
8 JUDGE FARRAR: -- what if we knew Mr.
9 Geisen didn't remember this document. Let's say the
10 June 27, 2001, document did not exist, it had never
11 been written, Mr. Geisen had never signed it, would
12 you have charged him?
13 THE WITNESS: Let me refresh my memory as
14 to what the 2007 document --
15 JUDGE FARRAR: June 27th.
16 THE WITNESS: -- June 27, 2001, document
17 is.
18 JUDGE FARRAR: Can we bring -- Andy, can
19 we bring that up? What's that exhibit number?
20 JUDGE TRIKOUROS: That may be Exhibit 31,
21 Staff 31.
22 JUDGE FARRAR: Try that Andy.
23 MR. GHASEMIAN: Yes, Your Honor. It's
24 Staff Exhibit 31.
25 JUDGE FARRAR: You're not in charge?

1 THE WITNESS: Can I see the rest of the
2 document?
3 MR. GHASEMIAN: Actually, there's a hard
4 copy I think in the binder in front of you, if you
5 want to --
6 THE WITNESS: Our documents?
7 MR. GHASEMIAN: Yes, Tab 31.
8 THE WITNESS: Which one is it, Andy?
9 Thank you very much, sir. Could I see the order to
10 Mr. Geisen?
11 JUDGE FARRAR: I think in the order --
12 THE WITNESS: I have the order, if you'd
13 like me to --
14 JUDGE FARRAR: -- on page 4 at the bottom,
15 this document is mentioned in the factual background.
16 No conclusions are drawn from it, but it's listed as
17 one of the background facts.
18 JUDGE TRIKOUROS: This document, just for
19 your information, as I understand it, is an evaluation
20 of whether or not if the -- if the reactor happens to
21 find itself in Mode 5 in a cold shutdown condition,
22 that an inspection would be -- it's an evaluation of
23 whether this particular inspection of the head would
24 be done or not at that point.
25 Prepared by Mr. Goyal and -- who works for

1 Mr. Geisen. And --

2 JUDGE FARRAR: Works for Mr. Swim who

3 works for Mr. Geisen.

4 JUDGE TRIKOUROS: He works for Mr. Swim

5 who works for Mr. Geisen. And Mr. Geisen, as the

6 department head, signed it.

7 THE WITNESS: My recollection --

8 JUDGE FARRAR: And it says in it -- it's

9 one, two, three -- three pages of pretty dense type,

10 says about the 12th RFO that large boron leakage was

11 -- from a flange was observed. The leakage -- this

12 leakage did not permit the detailed inspection of CRDM

13 nozzles. The flange was repaired, and the head was

14 cleaned.

15 And that was written about the subject

16 Judge Trikouros just described. And it was written

17 six weeks, five weeks before the bulletin came out

18 from the NRC staff. So suppose that document did not

19 exist.

20 THE WITNESS: I would reevaluate the

21 totality of the remaining information to determine

22 whether or not I believed it was adequate.

23 JUDGE FARRAR: Does the fact that the

24 document we received the other night -- and we haven't

25 gotten yet to the final decisionmaking process -- we

1 left you in the regions, but as long as we're talking
2 about this -- if I had been doing this for 40 years
3 like Mr. Hibey, I wouldn't do it in this order. I'd
4 wait and lay a better foundation. All three
5 paragraphs of the decision to bring this charge list
6 this document, and sometimes only this document, as
7 the basis for the charge.
8 THE WITNESS: I understand that.
9 JUDGE FARRAR: So if this document didn't
10 exist, and where we're going with this is if we think
11 Mr. Geisen didn't remember this document, what would
12 you have done?
13 THE WITNESS: I would have reevaluated the
14 remainder of the information and made an assessment
15 and a recommendation based upon that. This document,
16 Your Honor, is important in the sense that he signed
17 -- he signed and approved it.
18 JUDGE FARRAR: Right. It wasn't just a
19 green sheet coming to him and a dozen other people,
20 this was coming out of his department?
21 THE WITNESS: Correct.
22 JUDGE FARRAR: Did we prosecute -- did the
23 Staff charge Mr. Swim, who was closer to this document
24 than Mr. Geisen?
25 THE WITNESS: The Staff did not propose an

1 enforcement action against Mr. Swim.

2 JUDGE FARRAR: And would you like to tell

3 us now or later how you reconcile that?

4 THE WITNESS: At your leisure, sir.

5 JUDGE FARRAR: Why don't you do it now?

6 THE WITNESS: We did not find sufficient

7 evidence to indicate that Mr. Swim had specific

8 knowledge and took actions in contrast to that

9 knowledge as a part of our review of all of the

10 information.

11 JUDGE FARRAR: I'll --

12 JUDGE TRIKOUROS: Are you aware in the

13 testimony -- well, I guess you did not hear the

14 testimony of Mr. Goyal.

15 THE WITNESS: No, sir, I did not.

16 JUDGE TRIKOUROS: Mr. Goyal specifically

17 indicated to us that Mr. Swim had asked him to change

18 this document to make it appear more favorable. So

19 that, in fact, the document that Mr. Geisen read had

20 indicated that the head was totally cleaned when in

21 fact it hadn't been.

22 And Mr. Swim was not only aware that the

23 head hadn't been totally cleaned, but made sure in

24 essence that Mr. Geisen was unaware that the head was

25 totally clean, at least in that document. I don't

1 know if you -- I guess you're not aware of that, but
2 you're aware of it now.
3 THE WITNESS: Is there a question, Your
4 Honor?
5 JUDGE FARRAR: There always is a question
6 lurking in our comments, even if there's not a
7 question mark. So feel free to -- sometimes we say
8 what we're thinking, because we want your --
9 implicitly, we want your reaction.
10 JUDGE TRIKOUROS: This goes back to the
11 original question, sir, regarding: should the
12 punishment be the same for a manager who has deceptive
13 subordinates versus one who acted entirely on their
14 own to be deceptive?
15 THE WITNESS: The actions taken based upon
16 the individual's specific knowledge, and then the
17 actions that they take, if, as you portrayed to me,
18 Mr. Swim had specific knowledge and took action to
19 preclude others from having that knowledge, that may
20 affect his action, should we take an action.
21 However, the fact that he precluded others
22 from having knowledge doesn't remove the others from
23 potentially having knowledge in and of themselves and
24 on their own, for which we would consider that action.
25 Does that make sense to you?

1 JUDGE TRIKOUROS: Oh, it does. You're
2 telling me that the punishment should be the same.
3 THE WITNESS: I'm telling you I'd evaluate
4 each of the individual cases individually and
5 determine what knowledge individuals had, when they
6 had it, and then the other piece that you asked,
7 though, goes to -- there's a question in the factors
8 that we consider -- and I --
9 MR. HIBEY: Excuse me. Forgive me for
10 interrupting the witness, but is there any possibility
11 that the Reporter can put a marker on this answer, so
12 that at a break I might be able to hear it in its
13 precise wording? Is that doable with the technology
14 we have?
15 JUDGE FARRAR: The Reporter is indicating
16 that it is. Andy, do you -- you're not -- you can't
17 do it. Okay. But the Reporter can do that. It's --
18 according to my watch, that was given at about 9:39.
19 THE WITNESS: I apologize. I've lost
20 where I was, so let me see if I can't restart.
21 JUDGE TRIKOUROS: We were discussing --
22 oh, go ahead. Go ahead.
23 THE WITNESS: I just had to reload and
24 start over again. The factors talk -- one of the nine
25 factors -- and I don't remember exactly off the top of

1 my head, but they talked about the individual's
2 attitude and the things that they've done. We also
3 talked about their position. Those are things that
4 come into play in part of the dialogue that you
5 articulated.
6 If somebody is trying specifically to keep
7 information from the NRC, that's a factor we'll take
8 into consideration -- if they overtly take additional
9 actions to do that, we'll take that into
10 consideration. The factors are meant to be a starting
11 point for us that tend to cover most of the issues
12 that we would normally be involved with. But if
13 there's something else that comes up that we think has
14 a significant involvement or a significant impact on
15 our decisionmaking, that will normally be discussed.
16 JUDGE FARRAR: Suppose you were 50/50 on
17 someone, you weren't sure he had knowledge, and it
18 came to your attention that one time he submitted,
19 according to him, inadvertently some bad information.
20 And as soon as he found out it was bad information he
21 went back to his company and said, "We have to correct
22 that." Would that be a factor you would consider in
23 -- not just for itself, but overall, if we're trying
24 to infer whether this person had knowledge or not,
25 gee, here is a time when he learned, presumably after

1 the fact, that the information was false, and he
2 immediately went and got his company to fix it, would
3 that be a factor you would consider?
4 THE WITNESS: Yes.
5 JUDGE FARRAR: Was -- go ahead.
6 THE WITNESS: If I may continue, Your
7 Honor.
8 JUDGE FARRAR: Sure.
9 THE WITNESS: And I -- I'm now in
10 knowledge after the last two days worth of dialogue.
11 It would depend how they took that action. In the
12 particular case, the NRC has requirements for
13 individuals that find that they have been involved
14 with providing incomplete and inaccurate information.
15 We also have generic requirements upon reactor
16 licensees as it relates to corrective action programs
17 and how they are supposed to follow them.
18 I would believe -- and I'm making a
19 supposition based upon my time as a resident inspector
20 -- that most utilities have a requirement that if an
21 individual finds that they have provided incomplete
22 and inaccurate information, to the licensee or to the
23 agency, that they are required to complete a condition
24 report, provide that into the system, so the entire
25 management team can be aware of it, and the agency can

1 be immediately aware of it.

2 My recollection yesterday -- I'll slow

3 down, I apologize. My recollection yesterday is in

4 looking at the incomplete and inaccurate information

5 regulation, 50.9, I believe there is a two-day

6 requirement in 50.9 for notifying the agency if you

7 believe you have incomplete and inaccurate

8 information. That has a significant impact on safety.

9 I believe that. I'd have to go pull it up again to

10 refresh my memory.

11 JUDGE FARRAR: Okay. You are not going to

12 suggest to me -- first off, let's answer the question

13 apart from that regulation you just cited. The

14 hypothetical is a person whom you are not sure has

15 guilty knowledge realizes something has been submitted

16 at his instance that is incorrect and goes back to his

17 company, forget whether they followed the regulation,

18 and says, "Wow, we turned in something bad. We've got

19 to correct that." Is that a factor you would

20 consider?

21 THE WITNESS: I would definitely take that

22 into consideration as a part of my recommendation.

23 JUDGE FARRAR: Is that a factor you were

24 aware of when your panel sat in judgment of Mr.

25 Geisen?

1 THE WITNESS: I was not aware of that, no,
2 sir.
3 JUDGE FARRAR: So what you heard -- and
4 let's leave out the regulation. We'll get to that in
5 a second. Is that a factor that if you were sitting
6 in judgment on Mr. Geisen today you would take into
7 account?
8 THE WITNESS: Absolutely.
9 JUDGE FARRAR: Okay. Now, let's get to
10 the regulation. And let me not speak ill of agency
11 regulations. But I left here in 1980, as we mentioned
12 yesterday, and I was in the private sector for 21
13 years. And companies have procedures also.
14 If you come back from an NRC meeting and
15 you have a regulatory affairs guy, a government
16 affairs guy, who is the company link, who is the
17 official company link to the agency, and the agency
18 knows that, you don't pick up the phone and call the
19 agency. You go to your people and say, "Uh-oh. We
20 submitted -- we, the company, submitted something, and
21 that has got to be fixed."
22 Now, Ms. Clark tried to ask the question
23 yesterday, "What if the company says, 'Ah, be quiet,'"
24 and we didn't deal with that hypothetical because
25 whatever anybody says about that we don't all have

1 John McCain Hanoi Hilton moments, and none of us know
2 how we would react. And that didn't happen here.
3 The company took the -- filed the
4 information. In the same way they had filed the bad
5 information they sent in the good information. Maybe
6 they didn't do it in two days. Maybe there wasn't a
7 condition report. But if I'm sitting in judgment on
8 Mr. Geisen, that doesn't take -- the fact that the
9 technicalities weren't complied with doesn't change
10 what that would indicate about -- to us about what
11 this fellow does when he knows something, would it?
12 THE WITNESS: No.
13 JUDGE FARRAR: Thank you.
14 THE WITNESS: Your Honor, you had another
15 question?
16 JUDGE TRIKOUROS: Yes. You know, just an
17 inference, consideration. If a subordinate holds
18 information back from a manager, they typically are
19 doing that because they anticipate the manager would
20 take an action that they don't want to occur. In this
21 particular document, which I think is kind of an
22 ironic document in many respects, information that
23 would have been very important to Mr. Geisen possibly
24 was deceptively omitted, consciously omitted, in order
25 to arrive at the recommendation that they wanted.

1 And I find it interesting that the
2 recommendation in this letter says, "No catastrophic
3 failures are anticipated in delaying the head
4 inspection from now to 13RFO. There is no short-term
5 safety issue associated with the CRDM nozzle crack."
6 So that was kind of an ironic -- I thought an ironic
7 letter to deceive someone with.
8 But -- so such an inference that a -- I
9 would -- that a subordinate would hold back
10 information from a manager would be that the manager
11 was going to act in a way I didn't want, right, if I
12 were the subordinate, which is an inference of at
13 least some level of honesty or integrity on the part
14 of the managers. Would that be an incorrect
15 inference?
16 THE WITNESS: I'm not sure I'm qualified
17 to make that judgment, Your Honor.
18 JUDGE FARRAR: Mr. Ghasemian, you were in
19 the middle of your direct exam, but we'll get back to
20 you eventually.
21 MR. GHASEMIAN: Thank you.
22 JUDGE FARRAR: Mr. O'Brien, I want to
23 pause at this point and compliment you on your
24 forthrightness here in terms of discussing all of
25 this. This is going to be very helpful to us, and we

1 appreciate your efforts to address the simple
2 questions and the incredibly complex ones in the best
3 way you can.
4 You were talking about the enforcement --
5 the regional enforcement panel. What happened -- so
6 that group meets, and what did you all determine as to
7 Mr. Geisen?
8 THE WITNESS: That Mr. Geisen had
9 knowledge and acted contrary to that knowledge
10 deliberately. And, therefore, we reviewed and
11 determined a five-year ban was an appropriate
12 sanction.
13 JUDGE FARRAR: Okay. Now, so then, where
14 did -- how do you write that up, and where does that
15 go?
16 THE WITNESS: We have a process, a series
17 of information we put together generically to help
18 with the legal aspect of it. And so we go through
19 that process, and I had my staff start, and I finished
20 a draft of an order that lays out the facts that we
21 rely upon to come to that conclusion.
22 JUDGE FARRAR: And that is the first draft
23 of this order that eventually was issued?
24 THE WITNESS: Yes.
25 JUDGE FARRAR: Okay. Okay. Then, where

1 does that draft -- who do you send that draft to? And
2 then, how does that draft -- that order issues from
3 headquarters, so how does it get from your draft --
4 your draft embodying the regional decision, how does
5 that become a headquarters order? And what
6 consultations take place?
7 THE WITNESS: If I may step back just half
8 a second. When we make the decision, the enforcement
9 panel, that's an agency decision.
10 JUDGE FARRAR: Oh. That's not the --
11 THE WITNESS: The region leads enforcement
12 panels for the most part. But there are enforcement
13 panels that are region-specific. For example,
14 Regions I, II, III, and IV, we all have specific times
15 when we have panels. But that's an agency decision
16 that we are making there. That's the reason we have
17 headquarters on. That's the reason we have OGC on.
18 JUDGE FARRAR: So you didn't need to take
19 that decision and come here and have an enforcement
20 panel meeting here of other people who say, "Okay.
21 Justify to us this thing."
22 THE WITNESS: That's correct.
23 JUDGE FARRAR: Okay. So that was the
24 decision. So at that point you are just, if I can use
25 the term "looking for green sheet review at

1 headquarters," that eventually Mr. -- or Mr. Virgilio
2 signs off on it?
3 THE WITNESS: We are going through the
4 process of actually preparing the paperwork and
5 briefing managers along the way, yes. And making sure
6 that we have properly captured the appropriate words
7 and terms under the order, and that everybody has the
8 information necessary, and then answering questions by
9 other managers that may not have been at the panel or
10 may not have been involved, to make sure we have
11 addressed the questions that they might have.
12 JUDGE FARRAR: I'm getting indications
13 that some -- Eric, are you picking up the sound all
14 right? Can people in the back here? Okay. Can you
15 -- Mr. O'Brien, if you can come -- pull the microphone
16 closer to you and try to --
17 THE WITNESS: I have never been told I
18 have been, Your Honor. I appreciate that.
19 JUDGE FARRAR: Try to talk directly -- as
20 you see here, we're like two or three inches away from
21 it.
22 Okay. So was that headquarters process --
23 the headquarters approval process, was that difficult
24 or significant, or was it pretty much routine in the
25 sense of, "Here's the region, they have the

1 recommendation, they have looked at this"? Is that a
2 big deal or a little deal to --
3 THE WITNESS: It was my recollection of
4 the enforcement panel discussion it was a significant
5 discussion. It took a lot of effort and a lot of
6 time.
7 JUDGE FARRAR: No, I don't mean out in the
8 region.
9 THE WITNESS: That is the agency's
10 discussion, Your Honor.
11 JUDGE FARRAR: No, no. But I'm asking,
12 once you prepare the document, you don't send it right
13 to Mr. Virgilio and ask him to sign it, do you?
14 THE WITNESS: No, sir, I do not.
15 JUDGE FARRAR: I mean, the process of
16 getting it from you -- and you had a very complex
17 process with the panel, from you to Mr. Virgilio, do
18 people say, "Wait a minute. What's this?" I mean,
19 was that a difficult justification process, or do they
20 pretty much say, "This is what we pay you to do.
21 Thank you for sending it to us. I'll sign it"?
22 THE WITNESS: There were lots of dialogues
23 throughout the process. I don't know that I'd call it
24 difficult. We had a lot of discussions to make sure
25 everybody understood, make sure everybody had a clear

1 understanding of the bases and moving forward, and
2 making sure everybody was on the same sheet of music.
3 JUDGE FARRAR: Now, nobody anywhere in
4 this process knew Mr. Geisen, is that correct? The
5 people who had interviewed him were not in this panel.
6 Nobody knew him.
7 THE WITNESS: I want to make sure I answer
8 correctly, and I haven't looked at the sheet that
9 indicates all of the people that were at the panel.
10 My recollection, because of lots of other factors,
11 were the three individuals that were a part of the
12 investigation were not allowed to participate in the
13 panel.
14 JUDGE FARRAR: You had said you worked at
15 Kewaunee.
16 THE WITNESS: Yes, sir.
17 JUDGE FARRAR: He had been there for some
18 time. Did you call the people there, your old friends
19 there, and say, "I need some help on this. I'm about
20 to impose a five-year ban"? As we heard the other
21 day, it amounted to kind of like a death sentence.
22 I need to know who this person is and what
23 -- and what -- what is going to protect the agency
24 from bad people, and at the same time allow for his
25 rehabilitation, because we don't regularly impose

1 lifetime bans and we let Mr. Miller back in a year
2 because he said some things. You didn't call your
3 friends at Kewaunee and say, "Tell me about this
4 fellow"?
5 THE WITNESS: No, sir. That would be
6 wholly inappropriate.
7 JUDGE FARRAR: Thank you for your opinion.
8 We'll argue in the briefs whether that's an opinion
9 the Board should adopt.
10 This order was immediately effective.
11 THE WITNESS: Yes, sir.
12 JUDGE FARRAR: Why?
13 THE WITNESS: Our concern for public
14 health and safety.
15 JUDGE FARRAR: How had that concern been
16 manifested in the previous two and a half years? Did
17 you alert the citizens, the mayor, or the newspaper in
18 Kewaunee, Illinois, that they potentially had a
19 dangerous person on their site who could jeopardize
20 their health and safety?
21 THE WITNESS: I did not, sir.
22 JUDGE FARRAR: Did anyone?
23 THE WITNESS: Not to my knowledge, sir.
24 JUDGE FARRAR: Okay. So for two and a
25 half years this gentleman was at large, this dangerous

1 person was at large in Kewaunee, Illinois, nothing was
2 done, and then all of a sudden one day he is gone
3 without anyone finding out what he has done and who he
4 is. Is that correct?
5 THE WITNESS: If I may make one
6 correction, Your Honor. It's Kewaunee, Wisconsin,
7 although there is a Kewaunee, Illinois, I have learned
8 since moving to Wisconsin.
9 JUDGE FARRAR: Yes. And because I had a
10 good friend freshman year in college who was from
11 Kewaunee, Illinois. Forgive me. Kewaunee, Wisconsin.
12 Thank you.
13 THE WITNESS: Not a problem, Your Honor.
14 I apologize, I've lost the question.
15 JUDGE FARRAR: The question is: how can
16 you, on January 4, 2006, after having this report in
17 your hands for two and a half years, say that this
18 gentleman is such a menace that he must be immediately
19 removed from his job, even though you have let him be
20 in a job in another location for those two and a half
21 years, and you have not made any inquiry about what
22 his performance there has been, whether we could not
23 make this immediately effective, and perhaps say to
24 the people at Kewaunee, "We're looking at this fellow.
25 Don't let him sign anything until he has his challenge

1 and his hearing." Tell me how you justify that.

2 THE WITNESS: We can't generically, Your

3 Honor, take an action until we complete our review of

4 our activities. Even if the Office of Investigation

5 completes its investigation, it is one input into our

6 process. And there are other reviews and other

7 assessments that go on as a part of that process. So

8 once we receive that, and we review it, and we come to

9 a conclusion, then we take an action.

10 So we had the report for a period of time

11 beforehand, but until the staff reviews it and comes

12 to a determination and a determination that's agreed

13 upon by the agency as a whole, that's when I said it

14 would -- that's how we go about the process. So

15 that's why it would require us to come to that

16 conclusion on a whole before we took that action.

17 JUDGE FARRAR: How --

18 JUDGE HAWKENS: How does the pace of the

19 issuance of this order, which seems to me incredibly

20 slow compared to the pace of other issuances --

21 THE WITNESS: Your characterization is

22 close. It was a very long effort. Do you mean from

23 the time -- let me ask a question if I might, Your

24 Honor. I don't get to do this very often. Are you

25 referring to the pace from the time the investigation

1 was completed, to the time the order was issued? Or
2 are you referring to the amount of time between the
3 time we started reviewing more and more information to
4 the time it was issued? I'm not sure where the
5 relative timeframes are.
6 JUDGE HAWKENS: I guess there are two
7 questions, and I'd appreciate it if you'd answer both.
8 THE WITNESS: I was afraid once I started
9 down that path I was headed there. There are
10 circumstances where the Office of Investigation does
11 an investigation, and it is turned over to the
12 Department of Justice, where we hold in abeyance our
13 action. And then, we wait on that process, so as not
14 to interfere with the Department of Justice process.
15 There are other cases where we get the
16 information and we are able to act upon it
17 immediately. This case was with the Department of
18 Justice for a significant period of time, where we
19 were waiting for or observing their activities and
20 trying to discern when we would take our action.
21 JUDGE FARRAR: Because it's very important
22 that the Department of Justice be allowed to -- not to
23 be messed up with in their efforts to put criminals in
24 jail, or whatever.
25 THE WITNESS: That is correct, Your Honor.

1 JUDGE FARRAR: Is that so much more an
2 important government function that it is more
3 important that the -- than having the citizens of
4 Kewaunee, Wisconsin, protected from this dangerous
5 person?
6 THE WITNESS: We make an evaluation as a
7 part of this process. We have a regulatory and a
8 responsibility to the citizens above and beyond and
9 separate from the Department of Justice. We'll make
10 an assessment on our own as to what we believe the
11 appropriate answer is and whether or not we can or
12 can't wait, pending the Department of Justice
13 activities.
14 JUDGE FARRAR: And you made a decision
15 that you could wait for the Department of Justice.
16 THE WITNESS: That is -- I was not
17 involved in that decision, Your Honor, but yes.
18 JUDGE FARRAR: Then, why couldn't you make
19 a similar decision that, after you decided what
20 penalty should be on this person, you could wait a
21 little longer while he exercised his constitutional,
22 statutory, and regulatory right to an expedited
23 hearing, which of course he never got?
24 THE WITNESS: I'm not sure I can answer
25 with all the pieces that are in there, Your Honor, but

1 I can give you my best perspective.

2 JUDGE FARRAR: Okay. And before you

3 answer, I complimented you a minute ago on your

4 forthrightness in your answers. The irritation in my

5 voice, which will not come through in the transcript,

6 is not directed at you. It's directed at this

7 situation that the agency has created. So please

8 answer the substance of the question and ignore that

9 this is a concern, a grave concern to us.

10 THE WITNESS: Thank you, Your Honor. When

11 -- I'll speak generically, if that's okay for you, and

12 that will maybe help put it in perspective. When the

13 NRC receives a case from the -- our Office of

14 Investigation that potentially involves the Department

15 of Justice, we do what we call -- we do a review

16 before we even get the case.

17 Any time the Office of Investigations is

18 conducting an investigation, and they believe they

19 have identified wrongdoing, they provide a very

20 abbreviated set of facts to us and information to us

21 for our review to determine, at that point in time,

22 whether or not we need to take a specific action.

23 That was done in this case.

24 We reviewed that information at that time,

25 which does not have all of the exhibits, does not have

1 all of the information, does not have all of the
2 analysis, and there was a very extensive job done by
3 individuals within the Office of Enforcement in
4 headquarters, the enforcement staff in Region III, to
5 try and assess whether or not we needed to take an
6 action at that point in time.
7 The determination at that point in time
8 was that there didn't appear to be a reason for us to
9 have to take an action at that point in time, based
10 upon the knowledge that they had. Subsequent to that
11 point in time -- and I was not involved in that
12 process.
13 Subsequent to that point in time, we
14 received the report, and the associated documents with
15 it, and because it had been turned over to the
16 Department of Justice, the agency relied upon that
17 previous assessment to determine that there was not a
18 need for us to take an immediate action.
19 JUDGE FARRAR: So that as you're studying
20 the matter more thoroughly, you didn't need immediate
21 action.
22 THE WITNESS: As they were doing an action
23 many years ago, they came to that conclusion.
24 JUDGE FARRAR: Okay. And then, when you
25 wrote up your draft order -- when the panel met and

1 you wrote up your order, and Mr. Virgilio eventually
2 signed it, did someone say, "Why does this need to be
3 immediately effective?"
4 THE WITNESS: That was a part of our
5 recommendation, that it be immediately effective, Your
6 Honor, yes.
7 JUDGE FARRAR: And did you consider Mr.
8 Geisen more or less dangerous on the loose than you
9 considered, for example, Mr. Siemaszko who did not get
10 an immediately effective order?
11 THE WITNESS: If I may answer in a
12 slightly different manner, Your Honor, and see if it's
13 responsive to your need. In Mr. Siemaszko's case, he
14 was not working in the industry at the time. He did
15 not have an active role at the time. The discussion,
16 thought process there, he did not have the potential
17 to have an immediate impact on public health and
18 safety in activities regulated by the Nuclear
19 Regulatory Commission.
20 JUDGE HAWKENS: If he were now to get an
21 NRC licensed -- or a job with an NRC licensed
22 facility, do you have the authority to convert his
23 sanction to an immediately effective, or would you
24 consider that?
25 THE WITNESS: I believe we would consider

1 that, yes, Your Honor. As far as authority, I'd have
2 to consult OGC and others to make sure that I could
3 actually do what I say I would like to do. But, yes,
4 we would consider that probably immediately.
5 JUDGE FARRAR: Where was Mr. Campbell at
6 this time?
7 THE WITNESS: Could you help me with the
8 reference to time, Your Honor?
9 JUDGE FARRAR: While you're considering
10 charges -- did you ever consider charges against Mr.
11 Campbell?
12 THE WITNESS: Yes, sir.
13 JUDGE FARRAR: While you were considering
14 the charges against him and Mr. Geisen, where was Mr.
15 Campbell?
16 THE WITNESS: I apologize. I still need
17 to understand the -- specifically the "where" now. I
18 mean, do you mean "where" in terms of the process, or
19 where --
20 JUDGE FARRAR: No. Where was he working?
21 THE WITNESS: I don't have that knowledge
22 at the tip of my fingers, Your Honor.
23 JUDGE FARRAR: I think the evidence was
24 that he was running a different nuclear powerplant.
25 THE WITNESS: From the testimony I heard

1 yesterday, Your Honor, my understanding is he went
2 from the Davis-Besse plant to the Perry plant in the
3 timeframe of 2001, 2002, 2003. The time we were
4 looking at these actions, we were in the latter parts
5 of 2005, and that's when I said I'm not sure where he
6 was. I may have had that knowledge at one point in
7 time, but I don't have it at my fingertips.
8 JUDGE FARRAR: Why did you not bring
9 charges against him?
10 THE WITNESS: He didn't meet the criteria,
11 Your Honor. There was not evidence to indicate he had
12 specific knowledge and acted contrary to that specific
13 knowledge. The evidence did not provide me the
14 information necessary to take that action.
15 JUDGE FARRAR: Even though he signed all
16 these documents under oath and it was his ship, that
17 he was -- he was captain of the ship?
18 THE WITNESS: I could not find evidence in
19 the Office of Investigation report and the documents
20 associated with that that demonstrated that he had
21 specific knowledge and took action contrary to that
22 knowledge.
23 JUDGE FARRAR: And refresh me on Mr. Swim,
24 who we have learned here seemed to very -- well, let
25 me not characterize what we've learned here, because

1 he and his lawyer are not here. Why not Mr. Swim?

2 THE WITNESS: I apologize if this sounds

3 like a broken record, Your Honor, but we could not

4 identify that he had specific knowledge through the

5 information in the Office of Investigations report,

6 and that he took action contrary to that specific

7 knowledge.

8 JUDGE FARRAR: Are you suggesting that we

9 have learned more here about this case than the Office

10 of Investigations brought to your attention in 2003?

11 THE WITNESS: I would offer that I heard

12 things from Your Honors and others that I was not

13 specifically aware of before.

14 JUDGE FARRAR: Put yourself back in 2003.

15 You had -- and let's assume that you had in your

16 possession in 2003 the evidence you heard from Mr.

17 Geisen the last couple of days. What would your

18 decision have been?

19 THE WITNESS: My recommendation -- and I

20 changed the words intentionally, Your honor -- likely

21 would have been the same. I have heard more here that

22 raises more concerns relative to Mr. Geisen than I had

23 knowledge of specifically as a part of my review.

24 JUDGE FARRAR: All right. Let me ask you

25 a further hypothetical. Pretend you don't work here

1 right now, and that you are not governed by company
2 policy and authority and decisions. You are just a
3 random expert who used to work here, and we trust your
4 judgment.
5 Would you say the same thing, or would you
6 prefer that I not put you in the career-troubling
7 position of answering that question?
8 THE WITNESS: I would say the exact same
9 thing, Your Honor. My position has nothing to do with
10 my professional judgment.
11 JUDGE FARRAR: Thank you. You have heard
12 Mr. Geisen's testimony about what he has been doing,
13 and what has happened to him the last three years.
14 Presumably, when you issued this decision, you said,
15 "We'll give this fellow five years, and then he can
16 come back, because he will have learned his lesson."
17 If you didn't believe that, you would have given him
18 10 years or lifetime.
19 And Mr. Miller learned his lesson and came
20 back in a year. Do you think in the time that Mr.
21 Geisen has been under this order he has learned his --
22 in other words, you expected five years of a ban. Who
23 knows what happens in that five years? Mr. Goyal had
24 already fled the scene of this company, and was
25 working for Bechtel, so a year had no impact on him.

1 In other words, when you issue a five-year
2 order, you don't know the impact that is going to
3 have. Based on what you heard yesterday, do you think
4 we have succeeded in three years of achieving three
5 years in about three weeks -- in a case which should
6 have had an expedited hearing, do you think we have
7 achieved what you hoped to achieve with five years?
8 THE WITNESS: I'm not sure I can answer
9 that absolutely, Your Honor. As I indicated just a
10 moment ago, there were issues that were raised. There
11 is new information that came to my knowledge as a
12 result of sitting here the last day and a half that
13 raises concerns in my mind that I would have to look
14 into further.
15 I don't know that I have enough
16 information to come to the conclusion that there is a
17 full acceptance of the roles, responsibilities, and
18 expectations by Mr. Geisen of the -- that NRC places
19 on anybody that works in the industry, for
20 completeness, honesty, and forthrightness.
21 As the senior resident inspector -- and
22 I'll go just a little bit further, Your Honor -- I
23 explained once to an attorney that came to work for
24 the agency that I was working with, as a senior
25 resident inspector, I expected a licensee to tell me

1 everything that was going wrong, regardless of the
2 impact on them. That's the level of forthrightness
3 that I expect from an NRC licensee.
4 I expect an NRC licensee personally to not
5 look at the economics but to look at the safety of --
6 public health and safety at all times. And that
7 should be their primary focus.
8 JUDGE FARRAR: Like Mr. Campbell assuredly
9 did.
10 THE WITNESS: I understand your comment,
11 Your Honor. I can't speak to that. I did not hear --
12 the things I heard, the parsing of words that I heard
13 -- and I grant you it's a trial, so I understand there
14 is parts of that -- raise questions in my mind. I
15 have a very high standard that I expect an NRC
16 licensee to perform to.
17 JUDGE FARRAR: Let's assume you are
18 absolutely correct in that. The five years goes by,
19 and Mr. Geisen gets a job in the one industry where
20 people in America can get a job at this time in our
21 history. From what you just said, that's scary.
22 THE WITNESS: I'm sorry. I'm don't
23 understand, Your Honor.
24 JUDGE FARRAR: Well, you said you heard
25 things that you're not sure -- if I can paraphrase,

1 you didn't use the word, you are not sure he is
2 rehabilitated. So if he shows up in two more years
3 and gets a job because the industry desperately needs
4 people, that sounds, from what you said, that that is
5 going to be a scary situation, and we are not sure the
6 public health and safety in that neighborhood is going
7 to be protected.
8 THE WITNESS: My recollection, Your Honor
9 -- and I'm recalling, I don't have it absolutely in
10 front of me -- is the order to Mr. Geisen, as do many
11 orders, requires an individual that has been banned,
12 that upon return to the agency to provide the agency
13 information to demonstrate to us why we should have
14 renewed confidence in their ability to understand and
15 follow the NRC's rules and regulations.
16 JUDGE FARRAR: Hold on.
17 THE WITNESS: Near the end of the order,
18 my recollection, top of the last page.
19 JUDGE FARRAR: I know he has to give you
20 -- when he gets his next job, he has to give you
21 notice.
22 THE WITNESS: I think -- I'm not
23 absolutely positive -- there's a sentence in there,
24 too.
25 JUDGE FARRAR: Okay. He has to furnish

1 you a statement. Thank you for calling that to our
2 attention. He has to furnish you a statement.
3 Suppose you don't like that statement. You say, "I
4 was at the trial. I don't trust this guy. He has
5 furnished me a statement that says he has a
6 commitment." What are you going to do now, launch
7 another proceeding? The order doesn't say you can
8 amend the order and extend the ban based on what you
9 are thinking, then.
10 THE WITNESS: I believe, Your Honor -- and
11 I have not been involved in one of these, but I would
12 believe -- and if I was involved in this one -- we'd
13 consider the information that is provided and consider
14 it in the holistic aspect of where the individual was
15 and where the individual is going and what they say.
16 That's the best I can tell you. We'll evaluate it at
17 that time.
18 JUDGE FARRAR: And do --
19 THE WITNESS: If the NRC does not have
20 confidence that an individual ought to work in the
21 industry, the NRC will take the actions necessary to
22 protect the public health and safety.
23 JUDGE FARRAR: So you -- meaning you could
24 issue -- if you got his letter and he said -- imagine
25 he said something that you and I don't like, you know,

1 that says, "Uh-oh, this guy doesn't get it," you're
2 saying you could look at that, and if you had
3 justification from that letter, and presumably other
4 information, you would then -- the only way you can
5 keep him from working there -- well, there's two ways.
6 You could call the company and say, "We don't want you
7 to hire this guy, but we don't like" -- the nation
8 doesn't like government to act that kind of way. So
9 presumably you would issue another order?
10 THE WITNESS: That would be the legal
11 means that we would have available to us. The former
12 means that you articulated would be, in my personal
13 opinion, inappropriate. We're supposed to be an
14 agency who is scrutable and open to the public. The
15 things we do, and the thing I take pride in, that if
16 you give the same information to different
17 individuals, they'll come up with the same answer.
18 JUDGE FARRAR: Mr. Ghasemian, how is your
19 direct exam coming?
20 (Laughter.)
21 MR. GHASEMIAN: It's coming along just
22 fine, Your Honor. Thank you.
23 (Laughter.)
24 JUDGE FARRAR: I'm reminded we have been
25 at this an hour and 45 minutes, and that's not easy on

1 a witness. Are you -- to get an idea, Mr. Ghasemian,
2 will you have -- given the extensive nature of the
3 Board's questions, will you have much more in the way
4 of direct exam?
5 MR. GHASEMIAN: My plan was just to -- and
6 you've covered some of the areas, but it has caused me
7 to ask some follow questions. But generally, I was
8 going to go through the factors that were considered
9 in Mr. Geisen's case, and talk -- ask him about the
10 immediately effectiveness of the order, which you have
11 already covered. So I don't imagine it is going to be
12 a very prolonged --
13 JUDGE FARRAR: And don't feel compelled,
14 because you prepared the questions, to ask them if you
15 think they have fairly been covered. Or feel free to
16 ask them even though it is direct exam, just to use
17 any foundation that has already been established from
18 his answers and just, you know, don't repeat that,
19 just go -- paraphrase it and go right into it.
20 All right. Let's take a 13-minute break
21 until half past.
22 Thank you, Mr. O'Brien.
23 (Whereupon, the proceedings in the
24 foregoing matter went off the record at
25 10:17 a.m. and went back on the record at

1 10:30 a.m.)

2 JUDGE FARRAR: Be seated, please. Thank

3 you.

4 Mr. O'Brien, I'm still getting complaints

5 that people in the back might not be able to hear. So

6 if you'll make -- can that microphone come closer to

7 you, or is it at the end of its rope?

8 THE WITNESS: Oh, it probably could come

9 closer, Your Honor. I just --

10 JUDGE FARRAR: Yes. Yes, just --

11 THE WITNESS: I have a very loud voice

12 normally. The people that are complaining are

13 probably also -- and the ones that have indicated in

14 the past that I have been too loud, so I'm trying to

15 balance.

16 JUDGE FARRAR: Okay.

17 JUDGE HAWKENS: We've been told your voice

18 is dropping off towards the end of your statement. So

19 if you can concentrate on that, maybe that will help

20 out.

21 THE WITNESS: I will. Thank you very

22 much.

23 JUDGE TRIKOUROS: I just have a --

24 basically, a subjective question that I had asked Mr.

25 Geisen, and so I'd like to be fair about this

1 question. I had asked Mr. Geisen if the economic
2 factors associated with the -- with shutting the plant
3 down were affecting the decisionmaking process, and I
4 really was just -- I think I knew basically to some
5 extent the answer to that, but I wanted to hear his
6 answer.
7 But in fairness, I'd like to ask you the
8 analogous question. When an event occurs like Davis-
9 Besse, or TMI-2 in the earlier years, is there a
10 significant stress on the enforcement organization to
11 punish somebody or one or more people for this
12 condition? Is it -- do you feel that that might in
13 any way, you know, bias your thinking in regards to
14 lowering the bar, if you will, on reaching the
15 conclusions that you have to reach in your normal
16 processes?
17 THE WITNESS: Absolutely no.
18 JUDGE TRIKOUROS: Okay. You're very
19 comfortable with that.
20 THE WITNESS: Very much so, sir. That's
21 -- taking an individual action is a very, very serious
22 thing. I like to believe that the agency is very
23 focused on public health and safety, and I like to
24 believe, although probably sometimes naively, that we
25 are beyond the impacts of political and other factors.

1 I take great pride in the agency's ability
2 to be repeatable often -- be repeatable often in its
3 actions by individuals at different times and without
4 prior knowledge of the circumstances at the time. I
5 felt absolutely no pressure, zero pressure, to make
6 any decision other than the decisions I thought was
7 most appropriate based upon the facts in the case at
8 hand.
9 JUDGE TRIKOUROS: All right. Thank you
10 very much.
11 THE WITNESS: You're welcome.
12 JUDGE FARRAR: Notwithstanding that that's
13 your personal view, would you deny that at that time
14 -- first off, Davis-Besse was a bad deal, right?
15 That's --
16 THE WITNESS: It was a significant safety
17 issue.
18 JUDGE FARRAR: One of the most significant
19 the agency has had to deal with since --
20 THE WITNESS: Yes, sir.
21 JUDGE FARRAR: -- Three Mile Island?
22 THE WITNESS: Yes, sir.
23 JUDGE FARRAR: Would you deny that there
24 was great pressure within the agency -- I don't mean
25 political pressure in terms of Senator So-And-So is

1 upset about this, and so forth. But great pressure
2 within the agency to find out what happened, and to
3 hold someone accountable. And I'm not talking about
4 when it got to you for your particular decision that
5 you just talked about, but within the agency
6 generally, wasn't there an atmosphere this was a bad
7 deal and we've got to hold somebody accountable?
8 THE WITNESS: If I may answer in two
9 parts, Your Honor. I think the agency took it very,
10 very seriously and felt a great urgency and need to
11 understand the underlying safety and technical issues
12 without question relative to Davis-Besse. As to the
13 urgency to hold somebody responsible, my office, in
14 the form of a regional office, normally is the
15 starting entity for these sort of activities. I in no
16 way, shape, or form felt that pressure, and I would
17 have opposed that pressure had I felt it.
18 I can't speak for the rest of the agency,
19 though, Your Honor.
20 JUDGE FARRAR: Was there not a great deal
21 of pressure on the staff in the terms of suggestions
22 that if this happened -- and we do have resident
23 inspectors onsite and we had staff looking into this
24 -- that if this happened maybe the staff had screwed
25 up? Wasn't there some of that internal pressure?

1 THE WITNESS: I understand that as a
2 result of the Davis-Besse event we did do lessons
3 learned, and we did evaluate areas where we can make
4 improvements to our process.
5 JUDGE FARRAR: Was there any pressure that
6 a way to avoid accountability internally in the agency
7 is to say, "Somebody else gave us bad information"?
8 THE WITNESS: I felt none of that, Your
9 Honor.
10 JUDGE FARRAR: The company paid a
11 $30 million fine, more or less, to the Department of
12 Justice. Was that because of the actions of Mr. Cook
13 and Mr. Siemaszko and Mr. Geisen?
14 THE WITNESS: I don't have that knowledge,
15 Your Honor. That was a Department of Justice fine,
16 and I don't know the specifics of the basis for which
17 they made their fine.
18 JUDGE FARRAR: In your experience --
19 refresh me on your bio. Have you been in the private
20 sector?
21 THE WITNESS: No, sir, I work for the --
22 well, I worked for the State of Wisconsin for seven
23 years prior to joining the Department of Energy, prior
24 to joining the Nuclear Regulatory Commission.
25 JUDGE FARRAR: So you would have no

1 firsthand experience of why companies pay huge fines
2 to the Department of Justice and what they get in
3 return for that fine in terms of which officers are
4 not prosecuted?
5 THE WITNESS: I have no firsthand
6 knowledge, no, sir.
7 JUDGE FARRAR: And none of that affected
8 your decision to proceed against Mr. Geisen and not,
9 for example, against Mr. Campbell?
10 THE WITNESS: That is absolutely correct,
11 Your Honor.
12 JUDGE FARRAR: Okay. Mr. Ghasemian, we
13 are finally back to your direct examination.
14 MR. GHASEMIAN: Thank you, Your Honor.
15 BY MR. GHASEMIAN:
16 Q Mr. O'Brien, do you --
17 JUDGE FARRAR: And --
18 (Laughter.)
19 -- Judge Hawkens and I both worked at the
20 Department of Justice, and we have the highest regard
21 for how that agency is supposed to conduct its
22 business. Go ahead, Mr. Ghasemian.
23 THE WITNESS: Thank you, Your Honor.
24 MR. GHASEMIAN: Thank you, Your Honor.
25 BY MR. GHASEMIAN:

1 Q Do you make the final enforcement action
2 decisions for the agency?
3 A No, sir.
4 Q Who else is involved? Not necessarily
5 individuals, but departments or organizations.
6 A Enforcement actions involve the technical
7 staff, the legal staff, the enforcement staff, and the
8 senior management of the agency, depending upon the
9 level of the issue.
10 Q And do you know what the role of each
11 department is?
12 A Yes.
13 Q What's the role of the Office of General
14 Counsel?
15 A The Office of General Counsel provides
16 advice to the staff as to whether or not the
17 information present is consistent with the
18 requirements of the regulation and whether or not it
19 meets the legal standard.
20 Q I'm going to ask you a question about the
21 OI report. It was issued in August of 2003. When
22 that report was issued, had the agency made a final
23 decision regarding Mr. Geisen or any other individual?
24 A No.
25 Q Now, in Mr. Geisen's case, did the agency

1 rely on any one document to determine -- to reach the
2 conclusions that he did in -- on January 2006?
3 A I'm sorry. Could you repeat the question?
4 Q In issuing the order on January 4, 2006,
5 did the agency rely on any one particular document?
6 Was it just one document that the agency relied on to
7 make its decision?
8 A No.
9 Q Generally speaking, what did the agency
10 rely on?
11 A The documents that are cited in the order.
12 Q Did the agency rely on any testimonies by
13 any individuals? I mean, generally speaking, what are
14 the type of information that the agency relies on to
15 make its --
16 A In reaching our conclusion, we reviewed
17 the OI report, the exhibits associated with the OI
18 report, and other documents that were gathered by OI
19 as a part of their investigation, including
20 transcripts of individuals that they interviewed.
21 That's probably the best -- the most comprehensive
22 discussion I can give to that.
23 Q And the agency made its decisions based on
24 what it had available at that time.
25 A That's correct.

1 JUDGE FARRAR: Do you remember if you had
2 available a Mr. Martin's notes indicating that Mr.
3 Geisen had told him that he had reviewed -- that he,
4 Mr. Geisen, had reviewed the videotapes in August of
5 2001?
6 THE WITNESS: I believe the order to Mr.
7 Geisen includes that as one of the statements of fact.
8 JUDGE FARRAR: Ms. Clark, and counsel for
9 Mr. Geisen, let's remember to brief -- or maybe the
10 question is obvious. Are you allowed to defend the
11 order to Mr. Geisen on any ground, or only on the
12 grounds stated in it? I think the answer is probably
13 any ground, but we may want to explore that.
14 Go ahead, Mr. Ghasemian.
15 MR. GHASEMIAN: Thank you, Your Honor.
16 BY MR. GHASEMIAN:
17 Q Mr. O'Brien, let me put to you a
18 hypothetical. If an individual provides incomplete
19 and inaccurate information to the NRC -- let's say an
20 OI interview -- provides incomplete and inaccurate
21 information to the agent, and later realizes that they
22 provided incomplete and inaccurate information and
23 calls up the agent and corrects the record, how would
24 you consider that?
25 A We would consider the fact that they

1 identified it themselves and they brought it back to
2 the agency and highlighted it to the agency, in
3 assessing whether or not we would or wouldn't take any
4 action.
5 Q Is it possible that that would not be a
6 violation?
7 A The providing of information to the agency
8 as incorrect, in and of itself, is a violation. The
9 fact that the individual recognized it later and took
10 immediate corrective action would be taken into
11 consideration in terms of dispositioning that
12 violation.
13 MR. GHASEMIAN: Now, I'm going to go back
14 to my outline, Your Honors, and get into the factors
15 that Mr. -- well, the agency considered in Mr.
16 Geisen's case.
17 BY MR. GHASEMIAN:
18 Q I think you testified that you were
19 involved in Mr. Geisen's enforcement action?
20 A That's correct.
21 Q And your involvement was from the regional
22 perspective?
23 A That's correct.
24 Q And you were a member of the panel, among
25 others?

1 A That's correct.

2 Q Okay. Now, what was the conclusion that

3 the NRC -- that the panel and the NRC reached

4 regarding Mr. Geisen?

5 A That Mr. Geisen had knowledge and acted

6 contrary to that knowledge in providing incomplete and

7 inaccurate information to the NRC of a -- related to

8 a matter of great significance and safety importance

9 to the agency.

10 Q What was it about Mr. Geisen's conduct

11 that was of concern to the NRC?

12 A The willful provision of incomplete and

13 inaccurate information.

14 Q And by "willful," what do you mean?

15 A Deliberately and over a period of time and

16 in multiple examples, both in writing and orally,

17 providing incomplete and inaccurate information to the

18 agency.

19 Q And I think earlier you stated that the

20 nine factors in the enforcement policy were considered

21 in Mr. Geisen's case?

22 A Yes.

23 Q I think we have kind of hinted at it, but

24 kind of -- could you set up the circumstances leading

25 to the panel?

1 A Well, normally, as a part of holding an
2 enforcement panel, I or my staff will put together, in
3 concert with the technical staff and in consultation
4 with the Office of General Counsel -- theirs more
5 latter than an active participant -- a proposed
6 enforcement panel worksheet that discusses what we
7 believe the violation to be, what we believe the
8 evidence to support the violation, what we believe the
9 appropriate enforcement action is as a result of that,
10 and what other actions we think may or may not come
11 into play as a result of that.
12 When it involves an individual, we also
13 include an individual action worksheet, which will go
14 through and address the nine issues.
15 Q And so did the panel consider all of the
16 nine issues?
17 A Yes.
18 Q Nine factors?
19 A Yes.
20 Q And what was the sanction that the panel
21 determined to be appropriate for Mr. Geisen's conduct?
22 A A five-year ban from involvement in any
23 NRC-related activities.
24 Q Did you agree with that conclusion?
25 A Yes, I did.

1 Q Now, after hearing Mr. Geisen's testimony
2 yesterday, did you hear anything that would change
3 your conclusion or decision that you made back then?
4 A No.
5 Q Now, let's --
6 JUDGE FARRAR: If you believed that he
7 didn't know these things, that would change your
8 conclusion?
9 THE WITNESS: One of the two steps for
10 making the decision is that you have to have
11 demonstrated evidence that the individual had
12 knowledge and took action contrary to that knowledge.
13 If I believed there was evidence to clearly indicate
14 he did not have knowledge, that would affect my
15 decisionmaking.
16 JUDGE FARRAR: Go ahead.
17 MR. GHASEMIAN: Can we go back to the
18 policy? It's probably easier just to bring up the
19 factors and -- on the screen and go through them one
20 by one.
21 JUDGE FARRAR: Mr. Ghasemian, before you
22 do that, is that what this case -- can we -- is that
23 what this case is about? Or -- well, go ahead, but
24 let's do them fast.
25 MR. GHASEMIAN: Well, Your Honor, this

1 section of the hearing is about the sanctions and how
2 the agency went about determining these factors for
3 Mr. Geisen, so --
4 JUDGE FARRAR: You're right. And you have
5 -- I'm sorry, you have the burden of proof. And since
6 we're -- have evidenced some concern about it, I
7 apologize, go right ahead.
8 BY MR. GHASEMIAN:
9 Q I'm scrolling down to page 39. Actually,
10 41, excuse me. And these were the factors that we
11 were looking at earlier, right?
12 A Yes, that's correct.
13 Q Okay. Let's go through each one, and if
14 you could tell us how they were dispositioned relating
15 to Mr. Geisen's --
16 A Mr. Geisen had a position in the
17 organization --
18 Q Let's go one by one and -- so let's go to
19 number 1.
20 A That was the one I was starting with.
21 Q Okay.
22 A Unless you'd like me to start someplace
23 else.
24 Q No. So that the record is clear which one
25 we're talking about --

1 A Sure.

2 Q -- if you would wait for me just to say

3 one, two, three, and so on.

4 A The first --

5 Q Number 1?

6 A The first factor is the level of the

7 individual in the organization. Mr. Geisen was a

8 Design Basis Engineering Manager. He was an

9 individual that had oversight of a number of

10 individuals and represented the licensee to the

11 agency.

12 Q And how did that play into the

13 significance? Was that a neutral factor, aggravating

14 factor, or kind of a mitigating factor?

15 A That would be an aggravating factor.

16 Q And number 2, go ahead you can read it

17 and --

18 A The individual's training and experience,

19 as well as knowledge of the potential consequences of

20 the wrongdoing. That would also be an aggravating

21 factor. Mr. Geisen had specific training and

22 experience in the aspects associated with providing

23 complete and accurate information to the agency and

24 understood the consequences and the associated

25 potential consequences associated with the bulletin

1 and providing complete and accurate information to the
2 bulletin.
3 And the fact that the bulletin is a very
4 rare document issued by the agency raises its
5 significance quite a bit.
6 Q So let's go on to number 3.
7 A The third, the safety consequences of the
8 misconduct, the consequences here involve providing
9 incomplete and inaccurate information that allowed the
10 licensee to continue to operate the plant for a number
11 of months. That would not have been potentially
12 allowed had complete and accurate information been
13 provided.
14 And, in addition, afterwards obviously we
15 kind of know what we know, that we -- we realize there
16 was a hole in the reactor vessel -- not a hole, but a
17 cavity in the reactor vessel head afterwards.
18 JUDGE FARRAR: But no one would have
19 expected that to be a consequence.
20 THE WITNESS: No.
21 JUDGE FARRAR: I mean, it was a dramatic
22 consequence, but no one -- no one links that to the
23 information.
24 THE WITNESS: No. You -- the issue that
25 was involved with the bulletin was the potential loss

1 of coolant accident type aspect of that. I don't
2 think anybody prior to that had anticipated that, but,
3 as I said, you can't unknow what you know as a result
4 of that. We would have had the opportunity to have
5 ordered the plant to shut down two and a half months
6 earlier than it actually did.
7 JUDGE FARRAR: Mr. Wise, I think we
8 clarified this before, but you're not -- there is no
9 materiality element in your defense, is there?
10 MR. WISE: No.
11 JUDGE FARRAR: No. Okay. So, Ms. Clark,
12 you don't have to make that last question make you
13 nervous. So we are -- and I was not suggesting that
14 that made the information not material, but just in
15 terms of what happened, no one expected it.
16 Go ahead, Mr. Ghasemian.
17 THE WITNESS: The fourth factor that --
18 BY MR. GHASEMIAN:
19 Q Well, I've got a question about the third
20 factor. Now, as far as the safety consequence, does
21 it have to be an actual safety consequence, or is it
22 a -- or can it be a potential safety consequence?
23 A It can be either an actual or a potential
24 safety consequence.
25 JUDGE FARRAR: So if you give bad

1 information, and nothing happens -- I could use the
2 drunk driver analogy. You shouldn't be on the street
3 driving drunk even if you manage not to hit somebody.
4 In a sense, it's the same offense as if you had hit
5 somebody. You got behind your car drunk.
6 THE WITNESS: It's a serious offense, yes,
7 sir, Your Honor.
8 JUDGE FARRAR: Even if nothing happens.
9 THE WITNESS: Yes.
10 JUDGE FARRAR: Okay.
11 BY MR. GHASEMIAN:
12 Q Now, moving on to factor 4, how did the --
13 A If I might, just before you go on.
14 Q Okay.
15 A It's the potential, and that's the aspect
16 I wanted to make sure --
17 JUDGE TRIKOUROS: But there is a severity
18 implicit there, right? If there had been a serious
19 accident, this would have made the offense much worse.
20 THE WITNESS: That's correct, Your Honor.
21 If you look at the enforcement or on the supplements,
22 there is a discussion. And an actual consequence is
23 usually a much more severe issue than -- it is a more
24 severe issue -- my inappropriate use of terms -- more
25 severe issue than a potential.

1 JUDGE FARRAR: At the risk of a public
2 disagreement with my good friend Judge Trikouros, and
3 your answer, I'm not -- we need to explore that a
4 little more. My view, until I heard you say that, was
5 that given how the staff has to function, filing bad
6 information is a grave sin in and of itself, if
7 nothing happens. And, really, if something bad
8 happens because of it, that really has nothing to do
9 with it. The person filed bad information, and the
10 staff can't run this agency getting bad information.
11 THE WITNESS: Your latter statement I
12 would totally agree with, Your Honor. A person can't
13 file bad information. The agency does not accept
14 that. The agency also takes into consideration the
15 potential or actual safety consequences associated
16 with activities.
17 So, for example, when we talk about our
18 enforcement policy, our enforcement policy has
19 different levels, severity levels associated with
20 violations. For example, a normal severity level 2
21 violation would be a violation as to safety
22 significance where no actual event occurred. A
23 severity level 1 violation, a more severe violation,
24 was where safety consequences actually occurred, a
25 safety system was actually required to act, something

1 of that nature.

2 JUDGE FARRAR: Why wouldn't it be based on

3 the potential for the injury that could happen from

4 the bad information, and have nothing to do with

5 whether that injury actually occurred? In other

6 words, you may be filing false information about a

7 very critical system, and that is worse than filing

8 bad information about a non-critical system. But

9 whether the information later leads to those systems

10 failing is irrelevant to the fact that -- the

11 potential from the information you filed. No?

12 THE WITNESS: It's -- we take it into

13 consideration, Your Honor.

14 JUDGE FARRAR: Whether something happened.

15 THE WITNESS: Whether there was an actual

16 safety consequence.

17 JUDGE FARRAR: Okay.

18 THE WITNESS: Absolutely.

19 JUDGE FARRAR: Okay.

20 THE WITNESS: The fact -- to go back to

21 your drunk driving analogy, the fact that somebody

22 drives drunk has one aspect, as I understand it. The

23 fact that somebody drives drunk and maybe kills

24 somebody has a different aspect.

25 JUDGE FARRAR: If I was the Judge, it

1 wouldn't. But --

2 THE WITNESS: Understand. And I'm not a

3 lawyer, so I don't have that opportunity. But my

4 understanding is that is the case.

5 BY MR. GHASEMIAN:

6 Q But in either case, Mr. O'Brien, as far as

7 the potential safety consequence or actual, are they

8 both significant?

9 A They are both very significant.

10 Q It's just that if there's actual

11 consequence it's just a little bit more significant.

12 A Yes.

13 Q And how did this factor number 3 play into

14 Mr. Geisen's decision?

15 A It was an aggravating factor.

16 Q And why is that?

17 A Because, as I indicated earlier, the

18 incomplete and inaccurate information precluded the

19 agency from making a regulatory decision, which could

20 have included up to ordering the plant to immediately

21 shut down.

22 Q Now, moving on to factor number 4 -- go

23 ahead.

24 A Factor number 4, the benefit to the

25 wronged or either personal or corporate gain. It is

1 not clear to us whether or not -- it's not clear to me
2 even now whether or not there was personal gain.
3 Corporate gain one could imply. We talked about it.
4 We discussed it as a part of the process. this would
5 be an aggravating factor or neutral.
6 JUDGE FARRAR: But then, if there is
7 implicit corporate gain, why wouldn't we go after Mr.
8 Campbell, who is the person who was really mad when
9 Dr. Sheron called him?
10 THE WITNESS: I'd have to go back to my
11 previous answer, Your Honor, which is we didn't have
12 sufficient evidence to demonstrate that Mr. Campbell
13 had specific knowledge and took action contrary to
14 that specific knowledge.
15 JUDGE FARRAR: Okay.
16 THE WITNESS: I don't mean to be
17 redundant.
18 BY MR. GHASEMIAN:
19 Q Moving to factor number 5.
20 A The degree of supervision of the
21 individuals, i.e. --
22 JUDGE HAWKENS: Can we return to 4? Did
23 you say that was a neutral factor in this particular
24 case?
25 THE WITNESS: I would have -- I haven't

1 reviewed any notes that would tell me otherwise, so,
2 yes, I would assumed it would be neutral. One of the
3 things I indicated to you earlier is I take great
4 pride in the agencies to be able to reproduce what we
5 did and how we did it. My recollection is that that
6 item was neutral, yes.
7 BY MR. GHASEMIAN:
8 Q Now, going on to number 5, go ahead.
9 A The degree of supervision of the
10 individual, i.e. how closely is the individual
11 monitored or audited, and the likelihood of detection,
12 such as a radiographer working independently in the
13 field, as contrasted -- thank you -- with the team
14 activity at a powerplant.
15 In this case, Mr. Geisen was providing
16 information directly to the NRC, with very little
17 supervision of the information he had and how he was
18 doing it. There was not a number of levels or review
19 of that information.
20 JUDGE FARRAR: How much of your decision
21 was based on the fact that Mr. Geisen, perhaps
22 unwisely, became the face of the company for
23 submitting this information to you? He was always
24 putting his hand up trying to help with this
25 information, which turned out to be false. And to

1 what extent did you all sit there and say, "This is
2 the guy? Every meeting we went to this guy was there.
3 He is the company. Not Mr. Campbell, not Mr. Swim.
4 This is the guy."
5 THE WITNESS: I don't recall any
6 discussion in that nature, Your Honor.
7 JUDGE FARRAR: He came with the videotapes
8 and showed them to 20 staff people after hours.
9 THE WITNESS: If I --
10 JUDGE FARRAR: We heard endlessly -- to
11 what purpose I'm not sure -- about the ACRS meeting.
12 He spoke up, "I'll answer that." He was at the
13 technical assistance meeting. He was everywhere. He
14 was the company.
15 THE WITNESS: The items that you just
16 identified would go to the fact of on numerous
17 occasions -- on numerous occasions Mr. Geisen provided
18 information to the NRC that was incomplete or
19 inaccurate. That's what it would go to. There are
20 multiple examples of doing that same activity over and
21 over again.
22 JUDGE FARRAR: So nobody ever sat --
23 where's your office?
24 THE WITNESS: Pardon me?
25 JUDGE FARRAR: Where is your office?

1 THE WITNESS: My office is in Lisle,
2 Illinois, Your Honor.
3 JUDGE FARRAR: Where?
4 THE WITNESS: Lisle, Illinois, Region III.
5 JUDGE FARRAR: So nobody sat there and
6 said, "This is dreadful. We've got to get somebody on
7 this." And it was Geisen, he was everywhere?
8 THE WITNESS: Never that I heard. And,
9 Your Honor, if I had heard it, I would have corrected
10 the individual immediately. That's an inappropriate
11 action on the NRC's part.
12 JUDGE FARRAR: People don't talk like that
13 in the office when they're -- not at your meeting,
14 people don't talk like that in the halls?
15 THE WITNESS: If they do, I'm not aware of
16 it. If I was aware of it, I would have corrected it.
17 JUDGE FARRAR: Go ahead.
18 BY MR. GHASEMIAN:
19 Q Now, for number 5 -- I don't recall -- did
20 you say whether it's aggravating or neutral or
21 mitigating? I think --
22 A He wasn't --
23 Q I don't recall what you said.
24 A He wasn't closely supervised, so there
25 wasn't -- here we're looking to see if -- if we need

1 to be even more concerned about this individual in the
2 future, and that they do things without supervision,
3 without oversight, such that they could have the
4 potential to repeat this action and nobody would know
5 about it until something negative occurred.
6 And Mr. Geisen would be an individual who
7 had very little oversight and very little supervision
8 as it related to his review of activities that related
9 to the NRC's regulations, requirements, and
10 presentation of information to the agency. So it
11 would have been aggravating.
12 JUDGE HAWKENS: Can you explain to me why
13 that's a factor in deciding whether to sanction an
14 individual?
15 THE WITNESS: One of the examples that we
16 would look at is -- this is a part of the sanction and
17 the degree of the sanction in the sense of, are they
18 in a position where they can directly affect public
19 health and safety without any other oversight, without
20 any other involvement? Such that there is a much
21 higher probability of them taking an action
22 independent of anybody else such that they could
23 negatively impact public health and safety.
24 JUDGE TRIKOUROS: Now, this is where my
25 question earlier comes in. I had -- that item, that

1 factor number 5, is basically looking up at
2 supervision. But none of these factors are looking
3 down. So, for example -- and I believe it's missing
4 entirely, that if a subordinate is feeding information
5 to the party where it discusses, that information is
6 wrong, and that party then presents that information
7 to the ACRS, for example.
8 I assume you would take that into account,
9 yet it's not a factor here.
10 THE WITNESS: If I was to follow your
11 example, Your Honor, that individual would fail the
12 first test of the enforcement action process. They
13 would not have specific individual knowledge of the
14 wrongdoing, because the information they received to
15 act upon, that they provided to the agency, was not
16 incomplete or inaccurate. They didn't have the
17 specific knowledge.
18 JUDGE TRIKOUROS: And there, again,
19 becomes this -- arises this question of, if you can
20 pull a thread somewhere in this fabric that connects
21 that person, then that would activate number 1.
22 THE WITNESS: I'm not sure I understand
23 your comment.
24 JUDGE TRIKOUROS: The June 27th letter --
25 THE WITNESS: Right.

1 JUDGE TRIKOUROS: -- it had a sentence in
2 it that gave you the inference that Mr. Geisen had
3 knowledge, direct knowledge. So, therefore,
4 everything that happens downstream, including a
5 subordinate feeding incorrect information that gets to
6 the ACRS, is directly connected to that. Once you
7 pull that thread, once you connect that thread and you
8 pull it, it pulls everything.
9 THE WITNESS: I would agree with you that
10 that played a role in the overall activity. I don't
11 believe that's the only fact that's cited, but I would
12 agree with you that that played a role. There is --
13 Mr. Geisen did review, approve, and sign that
14 document.
15 Mr. Geisen had knowledge from what I heard
16 the last two days of activities relative to the head,
17 relative to the head's condition, relative to the
18 perspective of engineering issues associated with
19 inspecting the head, relative to the ability of any
20 inspection to be fruitful, given the condition of the
21 head, that -- as I said, that are of concern to me.
22 There are additional pieces of knowledge
23 that I did not have that further appear on surface,
24 without further review, to support that Mr. Geisen had
25 knowledge and took action contrary to that knowledge,

1 even separate from this letter.

2 JUDGE TRIKOUROS: But I do think that that

3 issue of subordinate deceptiveness is missing from

4 these factors. Thank you.

5 THE WITNESS: You're welcome.

6 BY MR. GHASEMIAN:

7 Q Now, Mr. O'Brien, let me just digress for

8 a moment, when the panel is considering these factors,

9 has the decision of the violation been made, or the

10 fact that the individual has the requisite knowledge

11 to get to this point? Or are these factors to

12 determine whether the person has knowledge?

13 A No. We have already made the

14 determination that the violation occurred.

15 Q So these factors go to the sanction, not

16 necessarily determining whether the person had

17 knowledge, is that fair to say?

18 A I believe so, yes.

19 Q Now, I think next, if there is no other

20 questions for number 5, let's go on to number 6.

21 A The employer's response, disciplinary

22 action taken. This factor is looking at the aspect of

23 the agency's goals of ensuring that others understand

24 the importance of complying with NRC rules and

25 requirements, and that there is a deterrent effect

1 there.

2 In this case, Mr. Geisen, as I recall, was

3 demoted and then left the organization. So that

4 either would have been a neutral or, in his case,

5 could have been a -- not aggravating, but mitigating.

6 Q Now, for number 7?

7 A The attitude of the wrongdoer, admission

8 of wrongdoing, acceptance of responsibility. There

9 was no admission of wrongdoing or acceptance of

10 responsibility, so this would be an aggravating

11 factor.

12 JUDGE FARRAR: And you don't take his

13 acceptance of responsibility, the repeated comment

14 that Mr. Geisen has made here and presumably made

15 earlier, "I should have looked closer at this. You

16 know, looking back on it, I can't -- I don't know why

17 I didn't inquire more. I had a clue" -- again, I'm

18 paraphrasing, but "I should have been more alert, you

19 know, should have raised questions."

20 If you don't think you've done something

21 -- well, let me phrase it this way. I have always

22 thought it was a good quality to be introspective and

23 to look at yourself and say, "I could have done this

24 better." Why is that not the equivalent of the

25 acceptance -- in other words, if you don't believe you

1 didn't tell the truth, you can't say, "I'm sorry I
2 didn't tell the truth." All you can say is, "I'm
3 sorry I didn't ferret out the truth." You know, "I
4 was asleep at the switch," whatever.
5 Why isn't what he has done the moral
6 equivalent of what you are looking for in number 7?
7 THE WITNESS: We were talking, Your Honor,
8 about how this was considered at the panel. I did not
9 have any of that knowledge or any of that information
10 at that point in time. My recollection of our
11 discussions regarding his testimony didn't indicate
12 any of those activities at that point in time.
13 JUDGE FARRAR: But no one at the table
14 with you had ever spoken to him?
15 THE WITNESS: We had -- you are correct,
16 Your Honor. We had reviewed his testimony, though.
17 JUDGE FARRAR: Does anyone ever say, "This
18 is the most serious action we can take against an
19 individual. Let's get him in here in front of our
20 panel, and let's look him straight in the eye and say,
21 'Friend, we are about to ban you for five years. Tell
22 us why we shouldn't do that.'"
23 THE WITNESS: The equivalent of that does
24 occur, Your Honor, yes.
25 JUDGE FARRAR: How?

1 THE WITNESS: There is a case that I can
2 recall where we did ban an individual for five years,
3 and we had the individual come into the agency and
4 talk to the agency beforehand.
5 JUDGE FARRAR: Okay. That's good. My
6 next question is -- you know my next question.
7 THE WITNESS: Why didn't we do that in
8 this case?
9 JUDGE FARRAR: Yes. Thank you.
10 THE WITNESS: We did not have the specific
11 testimony and information in that other case that we
12 had in this case. We felt we had the sufficient
13 information to make an appropriate judgment at the
14 time, without the need for having a predecisional
15 enforcement conference or a management meeting to
16 accomplish what you were describing, Your Honor.
17 JUDGE FARRAR: This is a big deal.
18 THE WITNESS: This is a huge deal, Your
19 Honor.
20 JUDGE FARRAR: This man's life is ruined,
21 and the government can't take a minute and say, "Come
22 on in, friend. We're about to lay -- lower the boom
23 on you." District Court, jury verdict, found guilty,
24 Judge is ready to sentence him. Person gets to talk.
25 You do a presentence report. A good judge studies the

1 presentence report, gets the probation officer in
2 there, and says, "I have this man's life in my hands.
3 Tell me about this man. Yes, he's guilty of
4 something. But what are we going to do with him?"
5 You have the same power. This is a far
6 more onerous sanction than a lot of district judges
7 ever impose in their life. I remember we had a lot of
8 interstate transportation of stolen motor vehicles,
9 and it being Louisiana a lot of people were shooting
10 too many birds and a whole lot of, you know, those
11 were the routine grist of our mill.
12 I'm not -- how many five-year bans have
13 been imposed in -- and maybe Mr. Luehman can answer
14 this. But how many, in your knowledge, in the four
15 years you've been doing this?
16 THE WITNESS: I've been responsible for
17 being involved with I believe five four-year bans.
18 JUDGE FARRAR: Five --
19 THE WITNESS: Six, excuse me. I
20 apologize.
21 JUDGE FARRAR: Six five-year bans.
22 THE WITNESS: That's correct.
23 JUDGE FARRAR: Three of them in this case.
24 THE WITNESS: Four of them in this case.
25 JUDGE FARRAR: Siemaszko, right?

1 THE WITNESS: Yes, sir.

2 JUDGE FARRAR: Okay. How many five-year
3 immediate bans?

4 THE WITNESS: I believe five of the six
5 were immediate, but I'd have to refresh my memory to
6 be sure of it.

7 JUDGE FARRAR: So once a year, one plus
8 times a year, the government doesn't have 30 minutes
9 to say, "Friend, we are about to ruin your life. Come
10 in, this is your last chance to convince us not to."

11 THE WITNESS: The enforcement policy talks
12 about the fact that we consider the opportunity for an
13 individual when they're interviewed by OI as a part of
14 that process.

15 JUDGE FARRAR: OI is a bunch of low-level
16 inspectors. They are not making the -- I don't mean
17 to denigrate their efforts, but that's a bunch of low-
18 level investigators. They have no competence to be --
19 they are not hired, and they are not expected to, and
20 they have no competence to make decisions about what
21 to do with these people. They are the ones who ferret
22 out the facts.

23 The people who make the decision don't
24 have a half hour once a year to invite these people
25 in? And I'm not denigrating what you're trying to do

1 to protect the agency's rights to good and to full
2 information. The people have rights in this country.
3 So tell me why we don't have a half hour to invite him
4 in?
5 THE WITNESS: I don't have an answer for
6 you, Your Honor.
7 JUDGE FARRAR: Remind me, Ms. Clark, Mr.
8 Wise, in your briefs, let's do the analogy to the
9 exclusionary rule, which you know is Weeks v. The
10 United States, where we sometimes reject valid
11 evidence that would get a criminal off the street,
12 because the government proceeded improperly in
13 gathering that evidence.
14 And we recognize this is dreadful. A
15 criminal goes free because the police didn't follow
16 the rules. Same as here; the staff doesn't want
17 people who can't be trusted at nuclear powerplants.
18 But if the government doesn't follow proper
19 procedures, then we -- the Supreme Court has decided
20 it is more important to let that person go than to let
21 the government follow improper procedures without
22 remedy.
23 Now, I know you will tell me procedures
24 were followed, but when you write the brief you can
25 say, "Assuming procedures weren't followed, why

1 shouldn't we use an analogy to the exclusionary rule?"
2 And when I talk about procedures, it's -- the primary
3 thing on my mind -- and here I'm speaking for myself,
4 I wouldn't dare speak for my colleagues -- is that
5 this was an immediate ban after two and a half years
6 of this gentleman being in Kewaunee, and that no one
7 around that table had ever interviewed this person and
8 tried to figure out who he was and what we needed --
9 what we needed to do.
10 So if you'll do the exclusionary rule
11 analogy, as I have explained it, we'd appreciate that.
12 JUDGE HAWKENS: Getting back to factor
13 number 7, you had indicated that when you were looking
14 at the paper record several years ago you did not see
15 evidence of remorse by Mr. Geisen. With us, you saw
16 a substantial expression of remorse yesterday. And
17 with that now in front of you, and contemplating that,
18 presumably that would have changed -- well, would it
19 have changed factor 7 to a mitigating factor as
20 opposed to an aggravating factor?
21 THE WITNESS: It could have. I didn't say
22 it would have. I heard a lot in the last day and a
23 half. I would have to sit and look at it in its
24 totality to understand the overall perspective.
25 JUDGE HAWKENS: Are you able to answer

1 this: assuming it had, would that have made a
2 difference in whether to proceed with issuing the
3 enforcement order?
4 THE WITNESS: If I assume -- let me make
5 sure I understand your question, if you don't mind,
6 Your Honor. You would like me to assume that we
7 believe there was a unique and specific admission of
8 wrongdoing and act of responsibility contrition for
9 this activity. And how would that have affected the
10 ban?
11 JUDGE HAWKENS: Correct.
12 THE WITNESS: It would have affected the
13 ban. We would have considered it. Would it have
14 changed it from five years? I can't say that that one
15 factor would have specifically changed it. We would
16 have taken it in its entirety.
17 However, our purpose in the enforcement
18 program is to deter and to ensure others understand
19 the importance for compliance. So an individual that
20 believes generically that they did things they
21 shouldn't have done, and that that caused things that
22 shouldn't have happened, and that affects our ability
23 to ensure public health and safety, and they are able
24 to articulate that, that makes a difference.
25 Absolutely. Because that's what we're trying to

1 accomplish. This is not intended to be punitive.

2 JUDGE FARRAR: Following that logic, it

3 may -- you're saying it may have had an impact on the

4 penalty. Would it also have an impact on whether an

5 order has to be immediately effective?

6 THE WITNESS: Yes.

7 JUDGE HAWKENS: You say it's not intended

8 to be punitive in the criminal sense. But are you

9 saying it's not intended to have a punitive impact on

10 the individual?

11 THE WITNESS: You went beyond my knowledge

12 base again, because I'm not a lawyer.

13 JUDGE HAWKENS: I mean, it's intended to

14 have a disciplinary impact. It's a sanction.

15 THE WITNESS: It's intended to deter non-

16 compliance and to encourage others to comply. And if

17 -- by your comment, I'll make a jump, leap of faith

18 here, and stop me if I'm jumping too far. If your

19 comment is that we intend for others to understand and

20 to see that we don't believe that providing the NRC

21 incomplete and inaccurate information is an

22 inappropriate thing, we take it very, very seriously.

23 Yes, that's exactly what it is intended to accomplish.

24 JUDGE HAWKENS: Right. And deterrence is

25 forward-looking. Punishment is backward-looking for

1 a particular act.

2 THE WITNESS: Okay. That's a new -- I

3 hadn't --

4 JUDGE HAWKENS: Now, will -- roughly

5 speaking, you're imposing discipline or administrative

6 sanctions for a past act, and it has a punitive impact

7 on the individual. You wouldn't -- you couldn't deny

8 that depriving an individual of his employment

9 opportunities --

10 THE WITNESS: Has a significant impact,

11 Your Honor. I agree with you wholeheartedly, without

12 question.

13 JUDGE FARRAR: Before we continue, Mr.

14 Ghasemian, Ms. Clark, did I say Weeks v. Ohio?

15 MS. CLARK: You said versus U.S.

16 JUDGE FARRAR: Okay. I was afraid I had

17 conflated it with Mapp v. Ohio.

18 Go ahead, Mr. Ghasemian. We are on

19 factor 8, I think.

20 MR. GHASEMIAN: Yes, Your Honor.

21 BY MR. GHASEMIAN:

22 Q Okay. Let's go on to factor 8, Mr.

23 O'Brien.

24 A The degree of management responsibility or

25 capability, this is not one where we identified that

1 there was management culpability or responsibility
2 associated with his specific actions. So it would
3 have been neutral.
4 Q Number 9?
5 A Who identified the misconduct? This would
6 be aggravating, because we identified the misconduct.
7 Q Were there any other factors that the
8 panel considered in Mr. Geisen's case?
9 JUDGE FARRAR: What's the role of the
10 resident inspector on that factor?
11 THE WITNESS: Could you help me better
12 understand your question, Your Honor?
13 JUDGE FARRAR: Yes. You've heard us talk
14 about the red photo?
15 THE WITNESS: Yes. I spent -- I'll
16 provide a response, and hopefully it will be
17 responsive to your needs. I spent 10 years of my
18 career as a resident inspector, Your Honor, so I think
19 I have a little bit of background in that area. We
20 have resident inspectors at sites for the purposes of
21 providing an onsite presence and conducting
22 inspections on a day-in and day-out basis.
23 They do their activities on a sampling
24 basis. So the residents do not see everything, are
25 not expected to see everything, and are not able to

1 identify every single wrongdoing that is occurring, or
2 every single violation that occurs at a site.
3 So if your question is: what role does it
4 have that somebody else may not have identified this?
5 None.
6 JUDGE FARRAR: When your resident
7 inspectors figure out what to do every day, and you're
8 in a refueling outage, and today is the day you are
9 going to clean the head, an area that is of interest
10 -- I assume is of interest to the agency, they don't
11 say, "I think I'll watch that today"?
12 THE WITNESS: They could. They might.
13 JUDGE FARRAR: Did you see the photograph
14 of Mr. Siemaszko getting out the huge chunks of boron?
15 THE WITNESS: No, sir.
16 JUDGE FARRAR: Did the resident inspector?
17 THE WITNESS: I can't speak for the
18 resident inspectors, Your Honor.
19 JUDGE FARRAR: Okay.
20 JUDGE TRIKOUROS: The degree of management
21 responsibility and culpability -- we heard testimony
22 this week that the vast majority of PWRs in this
23 country shut down and inspected, I think there were --
24 I think other than Davis-Besse there might have been
25 one, and I don't remember the exact testimony. But

1 the vast majority of PWRs shut down and inspected, and
2 would you agree that if -- if Davis-Besse management
3 had shut the plant down and inspected, that we
4 wouldn't be here right now?
5 THE WITNESS: That's a very plausible
6 answer, yes, Your Honor.
7 JUDGE TRIKOUROS: So, therefore, by not
8 shutting down in accordance with the bulletin, they
9 put people like Mr. Geisen, and others, in a position
10 of having to somehow defend the lack of shutdown.
11 THE WITNESS: My --
12 JUDGE TRIKOUROS: In this particular case,
13 the defense was very iffy, and the only way that these
14 people were able to justify it, to satisfy their
15 management, if you will, or satisfy the decision made
16 by their management, involved deception. There is no
17 management culpability in your mind. I see that there
18 -- maybe there is.
19 THE WITNESS: I understand your
20 perspective, Your Honor. The bulletin offered
21 licensees options as to how to approach things. This
22 licensee chose that option. That's within their
23 rights to accomplish unless we had an immediate health
24 and safety issue to order them to shut down.
25 JUDGE FARRAR: Okay. Mr. Ghasemian,

1 you've been at your direct exam for nearly three
2 hours. How much longer?
3 (Laughter.)
4 MR. GHASEMIAN: I'll try to wrap it up,
5 Your Honor. I apologize.
6 (Laughter.)
7 MR. GHASEMIAN: I think previously the
8 Board has -- basically, we're done with Mr. Geisen's
9 case, and basically the following inquiry is to
10 address your questions, Your Honor.
11 JUDGE FARRAR: Which ones are you going to
12 ask about?
13 MR. GHASEMIAN: Regarding the individuals
14 that the NRC did not take action against.
15 JUDGE FARRAR: Which ones?
16 MR. GHASEMIAN: Well, generally, all of
17 them. I mean --
18 JUDGE FARRAR: Well, there were --
19 MR. GHASEMIAN: -- specifically, I
20 think --
21 JUDGE FARRAR: -- there were 15 of them.
22 We don't --
23 MR. GHASEMIAN: Exactly. And you had
24 specifically named Mr. Campbell and --
25 JUDGE FARRAR: He has already --

1 MR. GHASEMIAN: Okay.

2 JUDGE FARRAR: You have already said what

3 you're going to say about them, right?

4 MR. GHASEMIAN: Yes.

5 JUDGE FARRAR: Yes.

6 MR. GHASEMIAN: But -- so we're --

7 JUDGE FARRAR: And the others, if that's

8 all the answer we're going to get on Campbell and

9 Swim, who have come to our attention in this case, I

10 don't see a particular need, unless my colleagues do,

11 to deal with the other 13, or however many it was.

12 MR. GHASEMIAN: Okay. Let me confer with

13 my colleague, Your Honor. We don't have any more

14 questions, Your Honor.

15 JUDGE FARRAR: I appreciate you preparing

16 for that, because that is what we thought we'd want to

17 hear a couple of days ago. But things change. Do

18 you --

19 MR. GHASEMIAN: No more questions, Your

20 Honor, at this time.

21 JUDGE FARRAR: Okay. Thank you. And,

22 again, it is not easy to conduct a direct examination

23 when a bunch of people are interrupting you all the

24 time. But that's how we do things.

25 Mr. Hibey, do you want a little break

1 before you start, or do you want to --

2 MR. HIBEY: Your Honor, if we could take

3 about a five-minute break.

4 JUDGE FARRAR: Yes. It's -- let's take

5 seven minutes until half past. Mr. O'Brien, is that

6 long enough for you?

7 THE WITNESS: Yes. Thank you, sir.

8 JUDGE FARRAR: And the longer you're

9 there, the more you get the right to put up your hand

10 and say, "I need a break or want to stretch."

11 Off the record.

12 (Whereupon, the proceedings in the

13 foregoing matter went off the record at

14 11:24 a.m. and went back on the record at

15 11:30 a.m.)

16 JUDGE FARRAR: On the record.

17 A couple of things we forgot to ask. Do

18 you want us to wait for Mr. Wise?

19 MR. HIBEY: No, Your Honor.

20 JUDGE FARRAR: Mr. Ghasemian, Mr. O'Brien.

21 THE WITNESS: Yes, sir. With seven

22 siblings, I answer to a lot of names.

23 JUDGE FARRAR: I'm asking -- Mr. Ghasemian

24 is on my mind -- I asked you about the Department of

25 Justice spying, about which you knew nothing. The NRC

1 imposed a civil penalty against the company.

2 THE WITNESS: Five, point, four, five

3 million dollars, Your Honor.

4 JUDGE FARRAR: Yeah, what's that about?

5 THE WITNESS: That was a civil penalty

6 associated with the violations that we cited the

7 licensee for.

8 JUDGE FARRAR: And is that because you

9 didn't like the licensee or you didn't like what the

10 licensee had done or you didn't like what people in it

11 had done?

12 THE WITNESS: That was a citation of civil

13 penalty against the licensee for the actions of the

14 licensee.

15 JUDGE FARRAR: The licensee doesn't take

16 action. The licensee has a lot of employees who take

17 action. So you must have said somebody working for

18 the licensee didn't do a good job or --

19 THE WITNESS: Lied to us.

20 JUDGE FARRAR: Could you have gotten them

21 for just mismanagement?

22 THE WITNESS: I don't believe I have a

23 regulation relative to mismanagement, Your Honor.

24 JUDGE FARRAR: Yeah. So what did you get

25 them for?

1 THE WITNESS: The violations are outlined
2 in the document we sent to the licensee. Off the top
3 of my head, operating the plant beyond tech specs for
4 a period of time from the 2000 knowledge to the time
5 they shut down in 2001; providing the NRC incomplete
6 and inaccurate information in a number of documents,
7 in a number of documents; and failure to properly
8 implement the corrective action program and the boric
9 acid control program relative to cleaning the reactor
10 vessel head.
11 JUDGE FARRAR: Suppose all of those --
12 wild hypothetical -- suppose all of those things you
13 just described had been done by Mr. Siemaszko
14 unbeknownst to company management. Would you have
15 gone after the company for $5 million for what Mr.
16 Siemaszko did?
17 THE WITNESS: Yes, sir.
18 JUDGE FARRAR: Come on.
19 THE WITNESS: We hold the licensee
20 responsible for the actions of all its personnel and
21 its contractors.
22 JUDGE FARRAR: I just said they didn't
23 know he did that.
24 THE WITNESS: My answer is still the same,
25 Your Honor. We hold the licensee responsible for the

1 actions of its personnel and its contractors. The
2 part of our policy is intended to insure the licensee
3 communicates to everybody the importance of complying
4 with NRC's regulations, and that's part of the reason
5 you also see the licensee actions in those nine
6 factors. The licensee is responsible for public
7 health and safety at that facility and making sure it
8 operates correctly, and it's responsible for the
9 actions of all of its staff and its contractors.
10 JUDGE TRIKOUROS: But the next executive
11 who signs under oath, under 50.54(f) submittal --
12 THE WITNESS: Demand for information.
13 JUDGE TRIKOUROS: -- doesn't have to worry
14 about it because as long as he can say, "I didn't
15 know," he's fine. Nothing happened to Mr. Campbell.
16 He signed under a -- there wasn't any desire to make
17 sure that the next submittal signed by an executive in
18 the company under oath doesn't have --
19 THE WITNESS: Wasn't of higher quality?
20 JUDGE TRIKOUROS: Yeah.
21 THE WITNESS: Yes, there was. Part of the
22 corrective actions the licensee undertook in response
23 to the incomplete and inaccurate information was to
24 put in place systems and measures to insure that
25 information provided the NRC is reviewed in a very

1 rigorous manner with a very documented trail to insure
2 that information provided the agency is complete and
3 accurate in all material respects.
4 JUDGE TRIKOUROS: And that was the company
5 that initiated that?
6 THE WITNESS: That was a requirement the
7 company had to undertake as a response to the
8 violations that we issued to them.
9 JUDGE FARRAR: Did anyone in the company
10 say to you or to anyone that you know about that
11 "we'll pay the $5 million, but you've got to agree not
12 to go after Mr. Campbell or anybody bigger than him"?
13 THE WITNESS: Not to my knowledge, sir.
14 And since I proposed the actions, I would be the
15 normal person that you'd have to impact to start that
16 process. As the enforcement officer in Region 3,
17 that's one of my responsibilities.
18 JUDGE FARRAR: Who was involved in the
19 negotiations, if there were any, between the Staff and
20 the company about paying -- about this fine?
21 THE WITNESS: Could you be more specific,
22 Your Honor?
23 JUDGE FARRAR: Who from the Staff was
24 involved in negotiations with the company about the
25 payment of this fine and the conditions that would be

1 accompanying it? Were you?

2 THE WITNESS: The fine was proposed in the

3 letter. To my knowledge there were no -- to my

4 knowledge, there were no negotiations regarding the

5 value of that civil penalty before its issuance. I

6 was involve din creating or coming up with the logic

7 for that civil penalty.

8 JUDGE FARRAR: So the company got the

9 letter and a check showed up.

10 THE WITNESS: No, sir. My understanding

11 is the company got the letter, and there were

12 discussions regarding its response to the letter, not

13 specifically with me but with others. I'm aware that

14 others had discussions.

15 JUDGE FARRAR: Others meaning?

16 THE WITNESS: My understanding is there

17 was discussions between the licensees -- the licensee

18 and the legal counsel in terms of the wording they

19 were going to put in their response.

20 JUDGE FARRAR: So before --

21 THE WITNESS: Not that it was negotiated,

22 but I think there was an informative thing.

23 JUDGE FARRAR: So before the company paid

24 a fine, they had the opportunity to meet with the

25 people who were proposing the fine and make some kind

1 of case.

2 THE WITNESS: Not to my understanding that

3 they made any case, Your Honor. I'm not aware of

4 anything of that nature.

5 JUDGE FARRAR: And Mr. Geisen didn't have

6 that opportunity.

7 THE WITNESS: I'm missing something, Your

8 Honor. I apologize.

9 JUDGE FARRAR: It's all right.

10 You said it would have been inappropriate

11 for you to call the folks at Kewaunee and see what

12 they thought about Mr. Geisen. Did you mean

13 inappropriate from a standpoint of the rules you

14 operate under or that it just wouldn't have given you

15 information that would be helpful to you in making

16 your decision?

17 THE WITNESS: Inappropriate from the rules

18 we operate under. Until we make an actual decision to

19 actually issue an order, that's a pre-decisional

20 activity, and that would be not appropriate with our

21 actions to do that.

22 JUDGE FARRAR: Wait a minute. Gathering

23 information is -- I know your memos are pre-

24 decisional, but gathering -- saying, "Hey, before we

25 make this decision, let's" -- and you don't have to

1 tell the people at Kewaunee what decision you're
2 thinking about -- say, "Hey, we're dealing with this
3 Geisen fellow. What do you think about him." They
4 don't have to know what you're thinking about Mr.
5 Geisen.
6 THE WITNESS: As you may recall, Your
7 Honor, from the factors that are on the Board, that is
8 not one of the factors we take into consideration in
9 determining the civil penalty, the action that we --
10 the sanction.
11 JUDGE FARRAR: Okay. It couldn't go to
12 knowledge? It's a close case about whether this
13 fellow has knowledge. Can we trust his answers?
14 That's not relevant, whether when he told the
15 investigators, "I didn't know," it's not relevant to
16 know whether he's generally an honest person or goes
17 around lying all the time about everything?
18 THE WITNESS: We took into consideration
19 the information we had which we believe provided
20 sufficient information in that regard, Your Honor.
21 JUDGE FARRAR: Just so we don't forget
22 this later, the order you wrote said Mr. Geisen is
23 banned from engaging in NRC license activities. And
24 then somewhere -- I can't find it right now -- it said
25 NRC licensed activities are as defined --

1 MR. GHASEMIAN: Your Honor, it's in the
2 same Item No. 1. It's the following sentence on page
3 16.
4 JUDGE FARRAR: Yeah. And later it
5 referred back to that.
6 Well, it doesn't matter if we find it or
7 not. Tell me what NRC licensed activities means.
8 I'll give you some examples. Could Mr. Geisen work
9 at a nuclear power plant on the computer help desk?
10 And these are kind of trivial examples,
11 but I'm trying to understand what this order means.
12 THE WITNESS: I would have to ask the
13 counsel of OGC. My initial gut reaction, Your Honor,
14 would be that if those activities had nothing to do
15 with NRC licensed activities, he may be able to, but
16 I can't state that emphatically.
17 However, in the example that you just
18 identified -- and I'm thinking on the fly, so I
19 apologize -- he'd have to have a clearance to have
20 access on site, and you have to be under the
21 licensee's Fitness for Duty Program more than like,
22 both activities which are NRC licensed activities,
23 which would probably preclude him.
24 JUDGE FARRAR: Can he work for an
25 equipment vendor?

1 THE WITNESS: So long as the vendor does
2 not come under NRC rules and regulations, yes.
3 JUDGE FARRAR: Who's still in business in
4 this country making reactors.
5 THE WITNESS: If I can offer Your Honor a
6 better option may be he could work for a contract for
7 the Department of Energy doing activities related to
8 non-NRC related activities.
9 JUDGE FARRAR: Can he work for what used
10 to be Westinghouse and GE and those, whoever makes
11 equipment for power plants?
12 THE WITNESS: With the same caveat as
13 before regarding getting guidance from OGC, I would
14 say if those activities involved NRC regulated
15 activities, the answer would be no.
16 JUDGE FARRAR: But I thought Mr. Miller or
17 Mr. Moffitt was working for a vendor under an order
18 just like this one.
19 THE WITNESS: He was and he wasn't. He
20 didn't have access to NRC -- to NRC facilities, and he
21 wasn't representing that vendor in front of the NRC.
22 He wasn't providing information relative to the NRC
23 for that activity.
24 JUDGE FARRAR: Well, that was my question.
25 THE WITNESS: Well, then I apologize.

1 Then I didn't understand.

2 JUDGE FARRAR: Can he work for a vendor

3 helping them manufacture the parts for a nuclear power

4 plant if he never goes to the power plant, never

5 services the equipment? He's just working in the

6 machine shop for the vendor.

7 THE WITNESS: My believe would be

8 potentially yes. But, again, I would have to make

9 sure I hadn't errantly made a decision that I don't

10 have the ability to understand completely.

11 JUDGE FARRAR: Can he work for a

12 consultant to the industry, someone who the company

13 calls on and says, "We've got a problem. We need help

14 figuring out what went wrong with this piece of

15 equipment"?

16 THE WITNESS: If we don't regulate that

17 entity --

18 JUDGE FARRAR: No, you don't regulate the

19 consultant?

20 THE WITNESS: If we don't regulate that --

21 JUDGE FARRAR: But you regulate the power

22 plant that has the problem.

23 THE WITNESS: If he provided information

24 to that licensee that they rely upon that's based upon

25 his, he may not -- it's likely he may not be able to.

1 Those are all options other than the one that you
2 brought relative to the vendor that I have not
3 explored personally.
4 JUDGE FARRAR: Okay. Mr. Hibey, I
5 apologize for the interruption, but I'm not sorry. So
6 go ahead.
7 MR. HIBEY: Not at all, Your Honor.
8 CROSS EXAMINATION
9 BY MR. HIBEY:
10 Q Now, Mr. O'Brien, the investigation, the
11 investigators came out of Region 3; is that correct?
12 A That is correct.
13 Q That would be Mr. Ulie and Mr. Gavula and
14 Ms. Janicki; is that right?
15 A That is correct.
16 Q And in the hierarchy of your station,
17 could you give me some idea of whether you're superior
18 to them or not?
19 A We are in two different organization. The
20 Office of Investigation reports -- investigators
21 within the Office of Investigation report to a field
22 office director. The field office director reports to
23 a manager here in NRC headquarters.
24 In my position as the enforcement officer,
25 I report to the deputy and the regional administrator

1 in the region.

2 Q But it is understood that the dynamic here

3 of information flow leading to decisions about the

4 ultimate question of liability or involvement in

5 wrongdoing, it's a flow that goes from the

6 investigators through their organization, ultimately

7 to your organization and the decision makers in the

8 enforcement side of the house; is that correct?

9 A I'm not sure I understand the question.

10 Q Well, what's complicated about the

11 question? I'm clear it up.

12 A I don't understand it.

13 Q You don't understand it. What I'm saying

14 is the information that starts with the investigators

15 and works its way ultimately to your organization; is

16 that right?

17 A The investigation is done by the Office of

18 Investigations. Their report and recommendations are

19 provided to the staff, and the staff then does the

20 evaluation and the resulting conclusion is a

21 compilation of the staff's activities, the Office of

22 Investigation, the Office of General Counsel, the

23 Office of Enforcement, and the agency as a whole.

24 Q All right. So you are part of the staff

25 in that particular description?

1 A Yes, sir.

2 Q All right. Now, do you know these people,

3 Messrs. --

4 A Who might that be, sir?

5 Q -- Gavula and Ulie and Janicki?

6 A Yes, I do.

7 Q Have they in the past been investigator in

8 other matters that you have ultimately had to work on?

9 A I don't recall specifically off the top of

10 my head, but that would be likely.

11 Q It would be likely. All right. So these

12 are people that you and your organization would,

13 therefore, rely on to conduct investigations that

14 could lead to appropriate enforcement actions; is that

15 right?

16 A That is correct.

17 Q All right. Now, in the order of January

18 6th, 2006, it says in pertinent part -- I think it's

19 at page 15 -- that serious doubt as to whether Mr.

20 Geisen could be relied upon to comply with NRC

21 requirements and to provide complete and accurate

22 information; is that right?

23 A If you're reading from -- I don't have it

24 in front of me. Sorry.

25 Q It's the -- I certify to you that it is

1 the order of environment, and consequently the public
2 health and safety must be protected; is that correct?
3 A Again, I don't have it in front of me. I
4 can't assert to that.
5 Q Now --
6 A If you'd like to put it up on the board I
7 can read it.
8 Q I don't have it to put up on the board.
9 I have it only in my notes.
10 A Okay.
11 Q Now, you were asked from the sanctions
12 point of view whether there was any significance to
13 the fact that Mr. Geisen worked at a nuclear power
14 plant for a period of three years before the order of
15 debarment was issued on him. Do you remember that
16 testimony?
17 A Yes.
18 Q And you were asked about the impact of
19 that fact on your decision making. So you remember
20 that testimony?
21 A Yes.
22 Q All right. Now, we've taken that
23 testimony, but I would like to know very clearly in
24 the record. You -- and I mean you and the people you
25 speak for today from that chair -- had no other

1 evidence of any activity or conduct on his part in
2 that three-year period to justify his five-year
3 debarment; isn't that correct?
4 A The enforcement action was based upon the
5 information that's included in the enforcement action
6 and only the information that is documented right
7 there at that point in time.
8 Q All right. Now, with respect to the
9 grounds for enforcement orders, the focus is on
10 whether there is a knowing violation; isn't that
11 correct?
12 A I would refer myself back to the
13 enforcement manual, enforcement policy in order to
14 read that specifically because I believe there's more
15 information there.
16 Q Well, we'll --
17 A If you'd like to read it, I'd be happy.
18 Q We'll get to it now.
19 A Okay.
20 Q But just let's break it down. You know,
21 what the enforcement -- you live by that enforcement
22 manual. So you know it, don't you?
23 A I would refer to the enforcement policy,
24 and I would bring it up in front of me before I would
25 answer that question.

1 Q All right. Well, then let me just ask you
2 what your knowledge is. Is it not true that the focus
3 is on whether there is a knowing violation that
4 results in inaccurate and incomplete information being
5 provided to the Nuclear Regulatory Commission?
6 A As I answered already, I would pull up the
7 enforcement policy, and if you'd like me, I'd read
8 that to you.
9 Q All right. Now, if an individual was
10 negligent with respect to incomplete and inaccurate
11 information that he provided in the course of
12 discharging his duties in his employment, would he be
13 someone who is considered by your organization as
14 knowingly providing incomplete and inaccurate
15 information?
16 A For us to make a determination that
17 somebody provided incomplete and inaccurate --
18 knowingly provided incomplete and inaccurate
19 information we'd have to find objective evidence that
20 demonstrated the individual had the knowledge and then
21 took an action contrary to that knowledge.
22 Q So it's actual knowledge.
23 A Yes.
24 Q It is not negligence.
25 A I'd go back to the specific words. When

1 you start using negligence, careless disregard, I go
2 back and I refresh my memory every time by reading the
3 policy.
4 Q You --
5 A They have to know that the information is
6 there and they have to take action contrary to that.
7 Q Do you have trouble with the concept as
8 I've asked it here of negligence?
9 A I tend to try and be very careful in how
10 I go about my activities.
11 Q Yes.
12 A And so in this manner and because it
13 involves this, I refer to the policy a lot, and so I
14 would go back and I'd read the policy to make sure I'm
15 not misspeaking here because I'm in court and I'm
16 under oath. So I'm trying to be careful and precise
17 in what I say to make sure and also, to be frank with
18 you, to be forthright and open. I'm trying to avoid
19 because I'm not a lawyer. I want to make sure I'm
20 telling you the correct answer, and I'm giving you as
21 much of it as I can.
22 Q Well, you've been in this business now for
23 a number of years. Hasn't the question ever arisen in
24 your experience --
25 A The question --

1 Q -- about whether someone has merely been
2 negligent in providing incomplete and inaccurate
3 information on a certain occasion?
4 A Yes.
5 Q All right. So that's lodged in your
6 experience. I ask you, therefore, based upon that
7 experience when you encounter someone who's been
8 negligent in the providing of inaccurate and
9 incomplete information, that is not someone who is
10 subject to punishment for having committed a knowing
11 action; is that correct?
12 A I believe you're asking me whether or not
13 the deliberate misconduct rule applies to individuals
14 that don't take actions in a deliberate manner, and
15 the answer is, no, it does not.
16 Q Well, now there are a lot of noes in that,
17 and I'm not sure I understand what you just said.
18 A In the enforcement policy, in the first
19 paragraph under individual actions, if you read it, it
20 will identify, I believe that mere negligence does not
21 constitute a deliberate misconduct.
22 Q All right. Well, that's the question I
23 was trying to find out.
24 A I put it my words to make sure I
25 understood what I was saying.

1 Q All right. Well, I'm not here to put
2 words in your mouth. I'm trying to get your
3 testimony.
4 A Okay.
5 Q Now, if I understand your testimony
6 correctly, the information upon which the enforcement
7 panel took its action is the information that was
8 provided by the Office of Investigations as compiled
9 in its report; is that correct?
10 A The report and the associated documents,
11 yes.
12 Q Yes, and I meant to take you onto that and
13 ask you that the report is, in fact, a document which
14 has lots of exhibits; is that correct?
15 A Yes.
16 Q And when you refer to the information in
17 the report, you also mean the transcripts of
18 interviews that were taken and various documents that
19 have been collected and put into the report; is that
20 right?
21 A That's correct.
22 Q All right. Now, did I understand that you
23 didn't talk to the investigators who did this
24 investigation, Messrs. Ulie, Gavula, Ms. Janicki; is
25 that correct?

1 A That's correct.

2 Q Now, that was described, I think, by you

3 in direct examination as a unique situation brought

4 about by the fact that there were detailed to the

5 Department of Justice for the criminal investigation

6 that the Department of Justice undertook as a result

7 of the Davis-Besse incident; is that correct?

8 A That's my understanding, yes.

9 Q And you understood that they were not

10 available to you because they were now subject to the

11 requirements of grand jury secrecy that attend the

12 investigation and ultimately the criminal prosecution

13 of people; isn't that correct?

14 A That was my understanding, yes.

15 Q So therefore, the analysis that was

16 undertaken by you folks when you were deciding

17 fundamentally two questions, whether Mr. Geisen

18 committed a knowing violation of the complete and

19 inaccurate information requirements and, if so, what

20 sanction, if any, should be imposed upon him, this was

21 done off the basis of the documentary record and

22 nothing else.

23 A That is correct.

24 Q All right. So basically what you did was

25 read a great deal of information, then discuss it with

1 your colleagues, and in this instance, concluded that
2 Mr. Geisen lied; is that correct?
3 A We concluded that Mr. Geisen had knowledge
4 and had taken actions contrary to those knowledge --
5 that knowledge. Yes, that is correct.
6 Q So he -- you can use the word -- he lied.
7 A He provided incomplete and inaccurate
8 information to the licensee and to the agency.
9 Q Is there a difference between that and
10 lying?
11 A I -- I -- no, probably not.
12 Q All right.
13 A It's a harsh word, one my mother taught me
14 not to use very often.
15 Q I see, but one you don't ignore when it
16 occurs; is that correct?
17 A I choose not to use that word if I can.
18 Q All right. All right. Now, I want you if
19 it is all possible to put out of your mind for
20 purposes of these discussions what you heard yesterday
21 in the testimony and see if we can get you back to
22 what your frame of mind and recollections and
23 understandings were at the time these decisions were
24 taken by the Office of Enforcement.
25 You knew that Mr. Geisen had no role in

1 the drafting of Serial 2731; isn't that correct?
2 A I believe that is correct.
3 Q You knew that his first interaction on the
4 record here with the Nuclear Regulatory Commission
5 occurred in the telephone call of October 3rd, 2001;
6 isn't that correct?
7 A I don't know that I would know that that
8 was his first involvement. I do know that he was
9 involved in that. I can't speak to the other facts.
10 I can only speak to the facts I know that were there.
11 I know he was involved in that call, if that's what
12 you'd like me to --
13 Q Well, I do, but I don't want the
14 qualification that you imposed on it, and I'd like to
15 be sure you're not telling this panel that you have
16 any knowledge of any evidence that you reviewed in the
17 records of the Office of Investigation report that
18 established that he had any interaction whatsoever
19 with the NRC until October 3rd, 2001.
20 MR. GHASEMIAN: Your Honor, I have to
21 object. This is a sanctions hearing. Whether what
22 Mr. O'Brien knows or doesn't know or how -- whether he
23 recalls whether there was a meeting in August, I'm not
24 sure how it goes to the decision that was made as far
25 as banning Mr. Geisen for five years. And are we

1 going to go through the whole -- I mean, we went
2 through four days of testimony to establish whether
3 there was a violation. Are we going to go through it
4 again?
5 MR. HIBEY: Well, first of all, the
6 function that this man represents was twofold. One
7 has to do with a determination that there was
8 liability here, and the second is once you establish
9 in your mind that there was liability, then you move
10 to sanction.
11 The policy that the gentleman refers to
12 seems to make very clear that there are these two
13 specific functions that he has to carry out. In order
14 for us to understand where we are on the punishment,
15 we should understand where they were on the underlying
16 question of liability. I keep using that word, but
17 you know what I mean.
18 (Pause in proceedings.)
19 JUDGE FARRAR: The objection is overruled
20 with this explanation. As the Board sees it, our
21 decision on Mr. Geisen's liability is based on the
22 evidence we heard from Monday through Thursday.
23 Nothing here goes to whether we think -- in other
24 words, what Mr. O'Brien thought about about liability
25 is not important to us in deciding whether Mr. Geisen

1 is liable, but liability and sanction are bound up
2 together, and that's what Mr. Hibey is cross-examining
3 on. So we will allow it for that purpose.
4 MR. GHASEMIAN: Your Honor, excuse me.
5 Just so -- I'm a little slow. So what other purpose
6 is there other than to get into the facts? There's
7 only one -- I mean, if Mr. Hibey is asking Mr. O'Brien
8 about how he evaluated the evidence that we heard this
9 last four days, is that -- I mean, I just want to get
10 understanding -- is that what we're going to go
11 through, what Mr. O'Brien thinks of the evidence?
12 MR. HIBEY: I specifically ruled out that
13 and tried to get back into his recollection then, not
14 as a result of yesterday.
15 JUDGE FARRAR: Mr. Ghasemian, Mr. O'Brien
16 was responsible for issuing an order that banned Mr.
17 Geisen from his job effective immediately for five
18 years. Mr. Hibey is going to have some leeway in
19 examining Mr. O'Brien on how well he did his job.
20 He's not on trial here, but his judgment is on trial,
21 and he recognizes that.
22 So Mr. Hibey has -- we will decide if Mr.
23 O'Brien said, "Now that I think about it, I don't
24 think he's guilty," we might still find him guilty
25 based on the evidence we heard from you from Monday

1 through Thursday. But Mr. O'Brien is here to defend
2 the sanction, and the process he went through to get
3 to that sanction involves the process he went through
4 to find liability. The evidence in front of him that
5 led to the sanction is the same evidence that led --
6 is some of the same evidence that led to liability.
7 So Mr. Hibey gets to cross-examine him.
8 MS. CLARK: Your Honor, I just want to
9 point out that what we will be eliciting from him is
10 his recollection of the evidence before him. So what
11 we will be determining is the accuracy of his memory
12 at this point, not the judgment that he used in
13 reaching any decisions.
14 JUDGE FARRAR: Wait, wait, wait, wait.
15 He's here to defend his judgment.
16 MS. CLARK: Yes, but Mr. Hibey's questions
17 are asking him how well he recalls the evidence that
18 was before him when -- from the OI investigation
19 report.
20 JUDGE FARRAR: Well, then I assume it
21 would be an appropriate maneuver at some point to for
22 you all to suggest that Mr. O'Brien before he answer
23 the question have something in front of him to refer
24 to or, Mr. Hibey, is that not permissible?
25 MR. HIBEY: Oh, it's permissible. I

1 propose to put documents in front of the witness at a
2 certain point in his questioning where I think I want
3 to drill down more, but let me make it clear why I'm
4 doing this or on what basis.
5 There is a December 20th, 2005 Office of
6 Enforcement notification of significant enforcement
7 action. I don't know if it's in the record, but I
8 actually have multiple copies, and at a certain moment
9 I'm going to put that before the witness and ask him
10 about a couple of the entries. Now, this I think is
11 well within the ambit of what we've been talking
12 about, and I think it will help us understand the
13 issues that are of concern to this panel.
14 JUDGE FARRAR: Okay, and, Ms. Clark, also
15 in response to your objection, we're not a jury. If
16 something comes in that shouldn't have come in and we
17 later realize that that was a big mistake to let it
18 in, we're very good at forgetting things. Sometimes
19 we forget things we're trying to remember. We're very
20 good at forgetting things that we weren't supposed to
21 look, unlike a jury where you have to protect them
22 more.
23 So we will allow this, and we can later
24 argue about any part of it that's not permissible, but
25 certainly in this case, we've come a long way and

1 waited a long time to get to this, and Mr. Hibey is
2 entitled to a lot of latitude on cross-examination.
3 BY MR. HIBEY:
4 Q Mr. O'Brien, you recall, again putting you
5 back in your recollection at the time this matter was
6 under your consideration, you recall that there was
7 evidence before you that Mr. Geisen relied on
8 information supplied to him by Andrew Siemaszko; is
9 that correct?
10 A Could you repeat it for me one more time?
11 Q You know that there was evidence before
12 you that Mr. Geisen relied on information provided to
13 him by Andrew Siemaszko; isn't that right?
14 A That's my understanding, yes.
15 Q All right, okay, and that had to do with
16 a table that appeared in Serial 2735. Do you remember
17 that?
18 A That was one of the pieces of information.
19 Q And you remember the photographs in 2744?
20 A That's another item in the order, I
21 believe.
22 Q Okay.
23 A Excuse me. I'm not sure 2744 is
24 articulated in the order. I'd have to go back and
25 look specifically.

1 Q All right. I'll accept that, if that is
2 the case.
3 Now, what is in this order -- and I think
4 it's time for me to ask Mr. Wise to slap a number on
5 the exhibit, and it's the enforcement notification
6 that should be in here.
7 (Counsel conferred.)
8 MR. GHASEMIAN: Mr. Hibey, you gave us
9 two, two copies. Does Ken -- does Mr. O'Brien have
10 one of these?
11 MR. HIBEY: I'm going to hand it to him
12 now.
13 MR. GHASEMIAN: Thank you, thank you.
14 (Whereupon, the document referred to was
15 marked as Geisen Exhibit No. 22 for iden-
16 tification.)
17 MR. HIBEY: One of those is a gift from
18 Mrs. Hibey. I had her copying it last night.
19 MR. GHASEMIAN: Great.
20 MR. HIBEY: I'm allowed to --
21 JUDGE FARRAR: Yes.
22 BY MR. HIBEY:
23 Q I'm handing you what's been marked as
24 Exhibit No. 22 for Geisen. Can you identify that
25 document?

1 A (Examining document.) Yes. This looks
2 like the notification that we would provide to the
3 Commission regarding an upcoming significant action.
4 Q I thought I heard you yesterday from
5 outside the well of the tort (phonetic) indicate that
6 you -- or maybe the day before -- that you wrote
7 orders; is that right?
8 A Right.
9 Q Did you write this document?
10 A No, sir, I did not.
11 Q All right. Are you familiar with this
12 document?
13 A I recall it, yes.
14 Q All right, and the circumstances of your
15 recollection are why?
16 A When this document was being put together,
17 I believe it was put together -- and I can check -- by
18 Mr. Starkey, and normally in the course of action of
19 this document being put together, it's shared with the
20 region to make sure we have a complete understanding,
21 and also Mr. Caldwell's signature is on there, who is
22 my regional administrator.
23 Q All right, and I take it you review it for
24 the completeness and accuracy of the document.
25 A I would have looked at the document, yes.

1 Q All right, and you were looking at the
2 document to be alert to the question of the accuracy
3 of whatever it was in this thing that they're in.
4 A I would be assuring that it provided the
5 appropriate message to the Commission relative to our
6 actions.
7 Q Well, the message to the Commission is
8 that you want to bring sanctions against certain
9 individuals; is that right?
10 A This is to inform them of our intent to
11 take that action, yes.
12 Q Now, you were in a very good position to
13 review this information because you were on the panel
14 that reviewed the evidence compiled in the OI report;
15 isn't that correct?
16 A That is correct.
17 Q All right. I'd like to direct your
18 attention to page 2, Paragraph 1 regarding Mr. Geisen,
19 but go down to the second paragraph where it says,
20 "Mr. Geisen, when interviewed by the licensee on March
21 27th, 2002, stated, in part, that he became aware that
22 the reactor vessel head had not been cleaned
23 completely when reviewing the videotapes of the
24 inspections in preparation for interacting with the
25 NRC in August 2001."

1 Did I read that accurately?

2 A I believe so, yes.

3 Q All right. Now, that's a very precise

4 piece of evidence, isn't it?

5 A It's a sentence, sir.

6 Q It's a sentence that contains a very

7 precise statement of evidence; isn't that correct?

8 A If you don't mind me, I do not mean to be

9 argumentative. I apologize. The information that

10 you're reading from is an informative document to the

11 Commission. The document that actually issued the

12 order to Mr. Geisen has the information that was

13 relied upon by the agency in making that decision. I

14 would have to refer to that to make sure that the two

15 pieces of information are consistent.

16 Q Well, I'm going in a slightly different

17 direction. That can be done, and I'm not standing up

18 here to contest that proposition.

19 A Okay.

20 Q What I'm saying is that you -- I'd like to

21 know where that information came from.

22 A I would want to go back and look at the

23 order, as is the normal course of action when we're

24 doing an enforcement order and we're providing

25 information to the Commission. We would utilize

1 information that's already included in the enforcement
2 order or other documents that we used to make that in
3 order to develop this document.
4 So that would normally be where it would
5 come from. I would have to go and do some research to
6 be able to articulate to you specifically where I
7 believe it may have come from. You'd have to talk to
8 the author specifically to talk to him to determine
9 his recollection of where it came from.
10 Q I'm asking for yours because you're the
11 representative here. I'd like to know where, putting
12 aside the reference or not into the order of
13 debarment; I want to know where those facts came from
14 according to your knowledge and recollection, having
15 reviewed what you reviewed. Where did that
16 information come from?
17 A As I just indicated to you, I would have
18 to look at other documents to refresh my memory to
19 indicate to you -- to give you an answer that was more
20 than a guess.
21 Q Well, those documents, would they not be
22 the interview notes of Mr. Jack Martin, who had the
23 occasion to talk to Mr. Geisen on March 27th, 2002?
24 Isn't that right?
25 A I already answered the question. I would

1 have to review notes to be able to discern where that
2 came from.
3 Q I am trying to find out whether that's the
4 information you would be looking --
5 A And I offered you a path to that solution,
6 sir.
7 Q And that path takes me to the interview
8 notes of Mr. Jack Martin; isn't that correct?
9 A I don't know that. I offered you a path
10 to get to that answer. If you'd like --
11 Q What about --
12 A -- I'd be happy to walk down that path.
13 Q What about the path you provided us on
14 your testimony? You said that it was from the OI
15 report in the OI documents; isn't that correct?
16 A What I said is the material that was in
17 the order came from the OI report and the OI
18 documents. That's correct.
19 Q All right. Now, do you have any
20 recollection of the OI report and the fact that that
21 was never discussed in the OI report? This interview
22 of Jack Martin of Dave Geisen as set forth in this
23 document, Defense 22, was not discussed in the OI
24 report?
25 A I don't have that recollection, no.

1 Q Do you have any recollection of the
2 material value that the investigators placed on Mr.
3 Martin's interview with them?
4 A I did not talk with the OI investigator
5 specifically about that.
6 Q All right. So one thing is certain then.
7 This is not grand jury information that the
8 investigators gave you prior to the indictment of this
9 case; is that correct?
10 A I had no grand jury information that I'm
11 aware of.
12 Q Okay. Now, can you recall whether there
13 was ever anything in the report itself that spoke to
14 the question of the materiality, if you will, of Mr.
15 Martin's testimony to the OI?
16 A I'd have to review the report and refresh
17 my memory in that regard. I do not have recollection
18 at this point in time.
19 Q Okay. Now, let me see if we can do that.
20 MS. CLARK: Your Honor, I know you want us
21 to give Mr. Hibey some leeway here, but I increasingly
22 am convinced that this has no relevance to the
23 enforcement order that Mr. O'Brien was involved with
24 or with the sanctions. This was a document that was
25 provided to the Commissioners. Mr. O'Brien had said

1 he didn't write this document. He just saw it.

2 Whether this is consistent with whatever

3 he might find in the OI investigation report, I just

4 can't see the relevance of this.

5 JUDGE FARRAR: Well, Mr. Hibey will at the

6 end of the day either connect up this memorandum to

7 the Commission with something that was done with the

8 decision making process or he will connect it to what

9 was in the mind of the people who imposed the

10 sanction, and so we'll expect that he will do that.

11 So your objection is overruled.

12 MR. HIBEY: Your Honor, I am presenting to

13 the witness an excerpt of the 200-plus page report.

14 JUDGE FARRAR: The OI report?

15 MR. HIBEY: The OI report of August 22nd,

16 2003, which is the report that the witness has

17 testified --

18 JUDGE FARRAR: Right.

19 MR. HIBEY: -- as being the basis for the

20 action that was taken on enforcement. The entire

21 report in its unredacted form is here, and I'm holding

22 it in my hand, for the record, and I know it's a

23 record of this agency. So I just want the Court to

24 know that.

25 JUDGE FARRAR: Let me ask a question. The

1 excerpt you've had identified is Geisen Exhibit 23?
2 MR. HIBEY: Twenty-two -- 23.
3 JUDGE FARRAR: Twenty-three. The OI
4 report has not previously been marked for
5 identification or introduced in this proceeding?
6 MR. HIBEY: No.
7 JUDGE FARRAR: Okay. Fine. Go ahead.
8 (Whereupon, the document referred to was
9 marked as Geisen Exhibit No. 23 for iden-
10 tification.)
11 BY MR. HIBEY:
12 Q Now, I have before you, Defense Exhibit
13 No. 23. You recognize the cover page to be the page
14 of the OI report; is that correct?
15 A It would appear to be so, yes.
16 Q Yes, and then following that, pages 5
17 through 11 -- excuse me. It was more than that --
18 five through 15 contain a table of contents that cites
19 to particular pages for the exhibits and testimony --
20 the documents and testimony of various individuals.
21 Have I characterized five through 11 correctly?
22 A That would appear to be the case, yes.
23 Q And then I go to page 29, which is the
24 next page in our packet. That has the statement of
25 the purpose of the investigation; is that correct?

1 And in the middle of the page after the
2 statutory citations, there is the purpose laid out.
3 The investigation was initiated by -- I can read the
4 whole thing, but it looks like Region 3 to me -- to
5 determine whether First Energy personnel at Davis-
6 Besse wilfully violated NRC requirements regarding the
7 reactor vessel head.
8 Have I paraphrased that well?
9 A Actually, no.
10 Q All right.
11 A The investigation was initiated on April
12 22nd, 2002 by the United States Nuclear Regulatory
13 Commission, Office of Investigation, Region 3. They
14 indicated that they're located in Region 3, but it's
15 the Office of Investigation that initiated the
16 investigation.
17 Q All right. Thank you for that
18 clarification.
19 A You're welcome.
20 Q And in that regard, just while we're here
21 on that page, it was to determine whether there was a
22 wilful violation of NRC requirements; is that correct?
23 A That is what it says. You're correct.
24 Q It wasn't questioned at that point of what
25 happened at Davis-Besse. There was a very pointed

1 focus on the question of wilful violation; is that
2 right?
3 A Investigation -- if I may a little
4 latitude in the response, Mr. Hibey, investigations
5 conducted by the Office of Investigation are normally
6 conducted as a result of an Allegation Review Board.
7 An Allegation Review Board receives information which
8 indicates there may be wrongdoing, which wilful
9 providing the NRC inaccurate and incomplete
10 information would be or discrimination. That's how we
11 do it.
12 For the case where we have a situation at
13 a facility where we were concerned with finding out
14 the technical aspects of what went on, and specially
15 in this particular case, the NRC conducted an
16 augmented inspection team in response to the event and
17 then conducted a follow-up inspection to determine the
18 appropriate violations associated with that.
19 So there are different processes if that's
20 helpful to you.
21 Q Well, without commenting on that, let me
22 ask you to take a look at the table of contents in
23 five through 15.
24 A (Examining document.)
25 Q Have you taken a look at those pages?

1 A Oh, yeah. I'm sorry. I was waiting for
2 a question. I apologize. Was there something
3 specific you wanted me to look at?
4 Q Yes, only after you've taken a look at the
5 pages, and I think you've gone through them.
6 A I went through them once quickly, yes.
7 Q All right. Isn't it a fact that Mr.
8 Martin's testimony is not referenced in the table of
9 contents that cover the report activity and findings?
10 A I haven't looked through it exhaustively
11 to discern whether it's there overtly or as a part of
12 something else. If that's your perspective, then I
13 can accept that, unless you'd like me to go line by
14 line.
15 A No, I think what I'd like you to do
16 because we don't have the time for you to go line by
17 line, as some of us had to do in order to come to that
18 question, let me direct your attention to page 211 in
19 the packet.
20 A Yes, sir.
21 Q Do you have that in front of you?
22 A I have it in front of me.
23 Q All right. If you'd look at the text
24 before the names are listed, that paragraph that
25 introduces the list of names.

1 A Yes. The paragraph that begins "the
2 following people" or the paragraph --
3 Q Yes, right, that one.
4 A Okay.
5 Q Do I read it correctly that "the following
6 people were interviewed by OI during the course of
7 this investigation, but during these interviews did
8 not provide any material information"?
9 Did I read that correctly?
10 A Yes, sir.
11 Q Now, let's turn to page 212, and in the
12 middle of the page, these names are listed
13 alphabetically; is that correct?
14 A It appears that way, yes, sir.
15 Q And you find in there the name of John
16 Martin.
17 A Yes, sir.
18 Q Is that correct? All right.
19 Now, do you know -- you wouldn't know.
20 I'll have to posit these dates to you. I'm prepared
21 to do so. In fact, I'll ask Mr. Wise to get the
22 exhibit regarding Mr. Martin's testimony before the
23 OI. And that would be 24.
24 (Whereupon, the document referred to was
25 marked as Geisen Exhibit No. 24 for iden-

1 tification.)

2 MR. HIBEY: I think there are four of them

3 there, and Dave's excerpt from Geisen, 25, right?

4 (Whereupon, the document referred to was

5 marked as Geisen Exhibit No. 25 for iden-

6 tification.)

7 BY MR. HIBEY:

8 Q Now, I've had marked and placed before you

9 Defense 24 and 25. Let us just briefly look at the

10 page on 24, the cover sheet. That is the interview of

11 John Martin for the Office of OI; isn't that correct?

12 A It would appear to be that, yes, sir.

13 Q It is that, is it not? Turn the page.

14 A I understand what you're putting in front

15 of me. It would appear to be that. I can't

16 personally attest that this is exactly that, but it

17 would appear to be that, yes.

18 Q Now, the date of that particular interview

19 is October 15th, 2002; is that right?

20 A Yes. That's what's indicated on the

21 document.

22 Q And let me direct you to page 18 of the

23 Martin interview for a moment.

24 A Page 18?

25 Q Yes.

1 A I'm going to direct your attention to the
2 page before that. It's 17, Line 20, and then read
3 into 18 a little bit. There Special Agent Monroe
4 asked Mr. Martin, "Did you have any help doing any of
5 the witness interviews for your investigation?"
6 And Martin says, "Well, the interviews I
7 did on my own, the ones that are mine, and the ones
8 Galbreth did he did on his own."
9 And Special Agent Monroe said, "So he
10 was," and then Mr. Martin said, "Operating
11 independently."
12 And Monroe says, "Okay."
13 Martin said, "We do not do them together."
14 And then it says, "Okay. Because a quick
15 look seemed that he interviewed some of the same
16 individuals that you did." Do you see that?
17 A I see that, yes.
18 Q Yes. So it is the case, is it not, that
19 the OI on the occasion of this interview, had the
20 interviews that Mr. Martin had conducted during his
21 time in March of 2002; is that right?
22 A I can't attest to that. I don't have the
23 context for this. I can only tell you what's right in
24 front of me and what you just read to me.
25 Q Well, on the basis of what I've just read

1 in front of you and if the context is skewed, somebody
2 else will challenge it, you would conclude, would you
3 not, that your agency had those exhibits?
4 A No, I would not.
5 Q Now, is it not the case that thereafter
6 there is discussion about how he conducted an
7 interview? That would be pages 19 and 20.
8 Let me direct your attention to page 20,
9 Line 5. The Agent: "Now, how exactly were these
10 statements taken? I see a number of, and I don't even
11 know if I could characterize them as statements."
12 And then Mr. Martin tells you how he
13 operates with respect to those. He says, "The way I
14 operate is these weren't intended to be a formal
15 investigation or a verbatim interview."
16 Wouldn't it be fair to say that, indeed,
17 those interviews that Mr. Martin took, including Mr.
18 Geisen, were in the possession of the OI at the time
19 they were doing this interview of Mr. Martin?
20 A I can't answer that, sir. I don't have
21 specific knowledge to that answer.
22 Q And you are in the business of
23 investigations; is that correct?
24 A No, sir, that's not the business that I'm
25 in.

1 Q Well, you have an enforcement background;
2 isn't that correct?
3 A That's correct. I'm the enforcement
4 officer.
5 Q And you review and you evaluate
6 information brought by investigators; isn't that
7 correct?
8 A Yes, that is correct.
9 Q And you look at a particular document and
10 you make inferences and ultimately judgments about
11 what you're reading; isn't that correct?
12 A Yes, that is correct.
13 Q Some of this stuff has to stick, doesn't
14 it, in order to --
15 A I don't understand the question.
16 Q -- the decision?
17 Well, you've heard me now.
18 A I don't understand the question.
19 Q You have to absorb the data and the
20 information and then you analyze it and you think
21 about it; isn't that correct?
22 A That is correct, sir.
23 Q Isn't that part of that holistic approach
24 you've been talking about?
25 A That is a part of the approach that we

1 use, yes, sir.

2 Q All right. So it's reasonable to infer

3 here that those interview notes were in the possession

4 of these investigators; isn't that correct?

5 A No, sir, not for me at this point in time

6 with the lack of information for me to infer that, no,

7 sir.

8 Q And it doesn't help you that Mr. Martin is

9 spending time explaining how he took these particular

10 statements?

11 A I've already answered the question, sir.

12 Q All right. I'm just adding another factor

13 to it. That's all.

14 What about the idea that he didn't go back

15 to the interviewee to get a concurrence about what he

16 had taken down as their statement, reading on page 20

17 at Lines 15 through 18, and indeed, 22, all the way to

18 22?

19 Didn't go back for concurrence, and didn't

20 give them the opportunity to read their statements.

21 Do I characterize what's on the page correctly?

22 A Yes, sir.

23 Q All right. So now we have -- I want to

24 turn your attention to 25 for a moment, and you don't

25 have to open up 25. Defense 25 is an excerpt from the

1 OI interview of Mr. Geisen, and I'm directing your
2 attention to the cover page only, and I ask you: the
3 date of that interview is October 29th, 2002; is that
4 right?
5 A That's what's indicated on the page, yes.
6 Q All right. Now, that is 14 days after Mr.
7 Martin was interviewed; isn't that correct?
8 A That appears to be correct, yes, sir.
9 Q And there's nothing in the entirety of the
10 Dave Geisen interview where he was asked about whether
11 he ever said to Mr. Martin that he had interactions
12 with the NRC in August of 2001.
13 MS. CLARK: Just a question of
14 clarification. Are you referring to this --
15 JUDGE FARRAR: Wait. Was that a question?
16 MS. CLARK: -- excerpt?
17 JUDGE FARRAR: Wait, wait.
18 MR. HIBEY: No. I'm going to use the
19 excerpt for something else.
20 MS. CLARK: Oh.
21 MR. HIBEY: I want to establish a date.
22 I'm putting the question to the witness that he --
23 THE WITNESS: I didn't hear a question.
24 I apologize.
25 MR. HIBEY: I'm sorry. I'll make it

1 clear.

2 BY MR. HIBEY:

3 Q There's nothing that you recall in the
4 Dave Geisen interview of the OI, which I take it you
5 read in its entirety, that suggests that Mr. Geisen
6 had interactions with the OI, with the NRC in August
7 of 2001.

8 A I'd have to go back and refresh my memory.
9 I can't tell you off the top of my head to that level
10 of specificity.

11 Q And the OI to your knowledge never
12 confronted Mr. Geisen with the information of Mr.
13 Martin contained in Mr. Martin's interview about
14 interactions in '01, August of '01; is that correct?

15 A I can't answer that question. I don't
16 have personal knowledge of exactly how OI conducted
17 its interview to that level of detail.

18 Q Well, what you have at one time had, the
19 information that you were looking to to ascertain the
20 ultimate question of whether Mr. Geisen had wilfully
21 violated NRC requirements, and as you've told us
22 repeatedly, I believe, that the source of those
23 materials was the OI report and what was contained
24 therein, to include its exhibits. Am I correct?

25 A We reviewed information father by the

1 Office of Investigation in support of our process.
2 Yes, that's correct.
3 Q All right. Now, with respect to the
4 information itself, is there -- do we have the exhibit
5 for the Martin interview itself?
6 MR. GHASEMIAN: In the Staff's exhibits,
7 yes.
8 MR. HIBEY: I mean, it's here, but I
9 didn't know its number.
10 We have up on the screen, and it may very
11 well be on that monitor which might be easier for you
12 to read, the Staff's Exhibit No. 63, and that's the
13 interview notes -- not the interview notes -- but the
14 typed statement of the interview Mr. Martin conducted
15 on March 27th of 2002 of Mr. Geisen.
16 BY MR. HIBEY:
17 Q And the fourth paragraph says, "I know,
18 became aware of it in viewing the videos of the
19 inspections while preparing for the NRC interactions
20 in August 2001."
21 Now, this statement of notice of
22 significant enforcement action says, which is Exhibit
23 22 -- forgive me.
24 JUDGE FARRAR: No, you're fine. We had
25 another matter here.

1 BY MR. HIBEY:

2 Q -- states that Mr. Geisen became aware

3 that the reactor vessel had not been cleaned

4 completely when reviewing the video tapes of the

5 inspections in preparation for interacting with the

6 NRC in 2001.

7 JUDGE FARRAR: August 2001.

8 MR. HIBEY: I didn't say that? A big

9 mistake on my part. Forgive me.

10 I'm referring you to Exhibit 22 so that

11 you can read it for yourself, and thank you, Your

12 Honor, for that correction.

13 BY MR. HIBEY:

14 Q And on page 2 again, it may very well be

15 underlined on your copy.

16 A It's not.

17 Q All right. Well, that's encouraging.

18 Again, the sentence reads in that second paragraph

19 under Paragraph 1, the last sentence, "Mr. Geisen,

20 when interviewed by the licensee on March 27, 2002,

21 stated in part that he became aware that the reactor

22 vessel head had not been cleaned completely when

23 reviewing the videotapes of the inspections in

24 preparation for interacting with the NRC in August

25 2001."

1 Now, the Martin interview speaks about
2 interactions. Do you agree?
3 A Those are the words that are used, yes.
4 Q Yeah, and the word "interact" is used here
5 as a verb in Defendant's 22, which is in front of you.
6 Now, assume that the OI report contains nothing on the
7 Martin interview, no one else's. In fact, it's
8 discounted as information that was not material. And
9 the OI report reveals no other evidence of Mr.
10 Geisen's involvement in August of 2001 with the NRC,
11 except for signing the green sheet at the end of the
12 month.
13 Then don't you think that you would need
14 to have evidence of interactions, meaning a number of
15 activities between him and the NRC, in order for that
16 sentence even begin to make sense, that sentence being
17 in Staff No. 63?
18 A There are too many hypotheticals in there
19 for me to get to that point. I'd have to look at the
20 entire set of information.
21 Q Well, let me --
22 JUDGE FARRAR: It's a simpler question
23 than that, I think.
24 THE WITNESS: Thank you, Your Honor.
25 JUDGE FARRAR: No, no. It's simpler than

1 that. It is answerable. So try to answer it.

2 THE WITNESS: Rephrase it for me if you

3 would.

4 BY MR. HIBEY:

5 Q You would expect, would you not, as

6 someone evaluating the information, which apparently

7 you folks had because you've got it here in this

8 particular document, that in August of '01 there had

9 to be -- I'm going to get away from the word

10 "interaction" -- there had to be give and take, there

11 had to be talk, there had to be dialogue, there had to

12 be documents, there had to be something between Mr.

13 Geisen and the NRC in order for that sentence to even

14 begin to make sense.

15 A No, I would not come to that conclusion.

16 Q You would not.

17 A No. There's an alternate viewpoint here.

18 I don't know if it's a fact or not, but let me offer

19 you the alternate viewpoint. "I know, became aware of

20 in reviewing videos for the inspections while

21 preparing for NRC interviews, comma, in August 2001."

22 That could mean the interviews were in August 2001.

23 That could also mean he was doing the preparations in

24 August 2001. I can't discern just from that

25 information what the absolute answer is.

1 JUDGE FARRAR: You said "interviews." You
2 meant interactions?
3 THE WITNESS: Your Honor, I apologize,
4 Your Honor. Yes, interactions.
5 BY MR. HIBEY:
6 Q There's no comma after that, is there?
7 A I understand there is not a comma there,
8 but I'm offering you that in looking at that, it's an
9 indeterminate type statement that would be difficult
10 for me in and of itself to discern its absolute value
11 or answer without looking at it further.
12 Q All right. Well, then that's what you
13 would require, somebody to look at it further; isn't
14 that right?
15 A I would try and evaluate it to better
16 understand it, yes.
17 Q That sentence up there right now is to you
18 ambiguous, capable of more than one meaning; isn't
19 that right?
20 A As written I would a difficulty coming to
21 a conclusion in and of itself.
22 JUDGE FARRAR: All right. Okay. I have
23 one more exhibit that I'd like to present to the
24 witness. This would -- I think I'm right. I'll make
25 the statement anyway and hope that I'm right and stand

1 to be corrected -- that that would end that part of my
2 examination having to do with some of the aspects of
3 the factual part of this enforcement action, and then
4 I would address in somewhat broader scope the factors.
5 But since so much has been done with them,
6 I hopefully over lunchtime be able to cut it down a
7 little bit. Is that fair?
8 JUDGE FARRAR: Fair enough.
9 MR. HIBEY: Staff Exhibit 47.
10 JUDGE FARRAR: Mr. Hibey, meanwhile, what
11 are we going to do with these? You've proposed
12 Exhibits 22, 23, 24 and 25.
13 MR. HIBEY: I was going to move them in,
14 Your Honor, but I would --
15 JUDGE FARRAR: Wait for that?
16 MR. HIBEY: Well, yes.
17 JUDGE FARRAR: Okay.
18 MR. HIBEY: Unless somebody has --
19 MR. GHASEMIAN: Your Honor, we have an
20 objection to some of them.
21 JUDGE FARRAR: Well, then he's not moving
22 them yet. So we'll wait.
23 MR. GHASEMIAN: Thank you.
24 MR. HIBEY: All right. Yeah, there it is,
25 47 up on the screen. It is 47.

1 BY MR. HIBEY:

2 Q Now, that document is listed in the OI

3 report as Exhibit 177. I'm going to certify that to

4 the Court and to counsel.

5 Now, when this exhibit first was

6 proffered, I'd say two days ago, there was a moment of

7 concern expressed by the panel or at least one member

8 that the handwriting which appears on page 2 -- or is

9 that the page number? -- or the page that's on the

10 screen was by an unknown author.

11 But later, I think, yesterday, on

12 information that you provided -- am I correct?

13 A No, you're not, sir.

14 Q Who identified the handwriting to belong

15 to Mr. --

16 MS. CLARK: The Office of Investigations.

17 BY MR. HIBEY:

18 Q All right. This, therefore, the

19 handwriting, according to this record, of Mr. Miller,

20 one of the persons whose fate you considered. Now,

21 have you had the opportunity to read -- were you here

22 when the exchange was made about the handwritten

23 language here?

24 A Yes, sir, I was.

25 Q And you generally know that I'm having

1 trouble reading it myself, but it says basically if
2 the NRC comes and sees our tapes, we are wide open.
3 Do you remember that?
4 A I remember that discussion, yes.
5 Q Do you remember also that there's nothing
6 in the OI report on this proposition, on this
7 language?
8 A I don't remember that, no.
9 Q Do you consider it -- assume for the
10 moment that that is the case. Do you consider this a
11 flaw in the fact finding of this investigation that
12 nobody in the OI or any of its reviewers ever focused
13 on this language and asked a person about it?
14 A I don't know that I consider it a flaw.
15 I would have to evaluate it further to discern its
16 value in the overall process.
17 You indicated earlier that it's not in the
18 OI report.
19 Q Wait.
20 A I'd like to finish my answer, if I may
21 please.
22 Q Okay, fine. That's fair. Go ahead.
23 A You said it's not in the OI report.
24 Q That's right.
25 A My understanding of the discussion the

1 other day, and correct me if I'm wrong, is this is a
2 part of the OI exhibits.
3 Q Yes.
4 A So that makes it a part of the OI report
5 per se.
6 Q Yes, yes.
7 A That's all I wanted to add --
8 Q All right.
9 A -- to correct what I understood you said.
10 Q All right. Well, let me take you one step
11 further. It's referred to, at least in my reading,
12 twice in the OI report, at pages 144 and 159, which
13 are not before you. I mean, I don't have the photo
14 for you. I mean, I have it here if anybody wants to
15 check.
16 A I understand.
17 Q And would it surprise you that the
18 references to Exhibit 177, which is here in this
19 particular proceeding, Plaintiff's 47, merely
20 certifies the presence of somebody at a meeting and
21 doesn't go at all into this information that's
22 handwritten?
23 Would that surprise you?
24 A I can't tell you what the Office of
25 Investigations did or didn't do with this information

1 or how they evaluated it. So I can't give you an
2 answer specifically as to how that was taken into
3 consideration or not taken into consideration --
4 Q All right.
5 A -- on their part.
6 Q Now, I just posed a question to you.
7 Would it surprise you if that lead were not followed?
8 That's all.
9 MS. CLARK: It -- presuming --
10 JUDGE FARRAR: I want to hear this. I
11 want to hear his answer.
12 THE WITNESS: Yes.
13 BY MR. HIBEY:
14 Q Because it casts serious doubt, doesn't
15 it, on the reliability, completeness and accuracy of
16 the information in the report?
17 A No, it does not. It does not place
18 serious doubt. It indicates that a single piece of
19 data may not -- and I don't know that for a fact --
20 have been followed up on, and it does not place
21 serious concern with my -- in the overall report, but
22 it does identify potentially something that agency
23 should look into or should evaluate further or should
24 ask further questions regarding to.
25 Q Then let me pose this hypothetical to you.

1 Assume that the author of that handwritten language
2 were interviewed and it was asked of him, "What did
3 you mean that we are wide open?" and the answer is,
4 "Well, those tapes are going to be very damning of our
5 organization."
6 One of the questions then is asked: well,
7 who know about that? And what if he didn't name Mr.
8 Geisen, or what if he said, "Dave didn't know," or,
9 "Dave didn't talk about it," or anything that like?
10 Wouldn't that have had a profound effect on the way
11 you'd look at Mr. Geisen in the case?
12 A That would be information I would
13 definitely take into consideration, absolutely.
14 Q All right. So you'd agree with me that
15 this could have a potentially terrific effect on the
16 outcome of whether to accuse this man, David Geisen,
17 of lying to the NRC.
18 A No, I wouldn't agree with you. I would
19 articulate that this has one other piece of evidence
20 that would, taken with all the other pieces of
21 evidence, we would take into consideration.
22 MR. HIBEY: Okay. Your Honor, if Your
23 Honor please, this may be a convenient time to break,
24 and then this afternoon I would turn to the sanctions
25 aspect of this.

1 JUDGE FARRAR: How long will that take?
2 And I'm not trying to limit you, but we're --
3 MR. HIBEY: No, no, I know exactly what
4 you're saying.
5 JUDGE FARRAR: -- we're conscious of Mr.
6 O'Brien's airplane. But, Mr. O'Brien, I have to alert
7 you. I'm not all that conscious. I'm conscious of
8 it, but --
9 THE WITNESS: I appreciate your
10 consciousness.
11 JUDGE FARRAR: I'm conscious if we can
12 help you, but that's not why we're here today. So --
13 THE WITNESS: I'm here till you need me,
14 Your Honor.
15 JUDGE FARRAR: Thank you. Appreciate
16 that.
17 MR. HIBEY: We appreciate that. Thank
18 you.
19 I will abbreviate the second portion of
20 this. There are some things I do want to go over with
21 the case.
22 JUDGE FARRAR: How long of a lunch break
23 would you like?
24 MR. HIBEY: I don't care about that.
25 Whatever you want to do.

1 JUDGE FARRAR: Can everyone eat and be
2 back in an hour?
3 MR. HIBEY: Oh, yes.
4 MR. GHASEMIAN: Yes, Your Honor.
5 MR. HIBEY: Or make it shorter.
6 JUDGE FARRAR: Okay. Do you want to do 45
7 minutes?
8 MR. GHASEMIAN: That'll be fine.
9 JUDGE FARRAR: Okay. Let's do 45 minutes.
10 Well, let's make it we'll be back at ten of.
11 MR. HIBEY: Thank you.
12 JUDGE FARRAR: And, Staff, do you still
13 owe us this strategy form as an exhibit, the strategy
14 form dealing with Mr. Geisen, or did we deal with that
15 yesterday?
16 MR. GHASEMIAN: We don't --
17 JUDGE FARRAR: Remember you gave us at
18 night a whole bunch of internal stuff?
19 MR. GHASEMIAN: Yeah, those are the
20 documents that Mr. Hibey had requested the Board to
21 ask.
22 JUDGE FARRAR: Right, but we asked the one
23 about Mr. Geisen be made somebody's exhibit and
24 introduced. And I noticed that the box on the top is
25 one of those text boxes where the computer has the

1 information, but only a little bit of it prints out in
2 the size of the box. So we may want to see how we can
3 get more.
4 I would just tell you it has a box within
5 where you run out of box, and so a bunch of
6 information is hidden. I don't know how you make the
7 computer generate that, but this is the request dated
8 August 18th, '05, and it has a number on it, 05182.
9 It deals with Mr. Geisen. We talked about the page 2,
10 but to make it complete we ought to have that box on
11 page 1.
12 MR. GHASEMIAN: Your Honor, just based on
13 my own experience, I don't think we can expand that
14 box. So it's kind of just basically a printout of
15 this green --
16 JUDGE FARRAR: That's fine. That's fine.
17 MR. GHASEMIAN: So I'll check on it, but
18 I think that's --
19 JUDGE FARRAR: And if we can't get that
20 today, we'll keep the record open until we get it and
21 everyone knows what it says, but I just want to make
22 sure a complete document is in that.
23 THE WITNESS: Your Honor, if I may, my
24 recollection of that system is that box is a limit and
25 that's all it is, and once you finish filling that

box, you have to go to page 2.

JUDGE FARRAR: Oh, okay.

THE WITNESS: So my recollection -- and I'll check when I walk back to the Office of Enforcement -- is that that's a fixed volume box, and you can't go beyond it. You have to go onto another page.

JUDGE FARRAR: Okay. That would be helpful.

THE WITNESS: I'll check on that while I'm out.

JUDGE FARRAR: Appreciate that.

THE WITNESS: You're welcome, sir.

JUDGE FARRAR: Thank you all. We'll be back at ten of.

(Whereupon, at 1:04 p.m., the hearing was recessed for lunch, to reconvene at 1:50 p.m., the same day.)

JUDGE FARRAR: Be seated please. Thank you.

Whereupon,

KENNETH O'BRIEN

resumed as a witness called by counsel for the NRC Staff and, having been previously duly sworn, was examined and testified further as follows:

1 MR. GHASEMIAN: Your Honor, if I may be
2 heard.
3 JUDGE FARRAR: Yes, Mr. Ghasemian.
4 MR. GHASEMIAN: Yes. Since this is a
5 natural break in Mr. Hibey's cross-examination and
6 he's moving on to the sanctions or factors part, maybe
7 -- I offer that this may be a good opportunity for the
8 Staff to have the chance to ask some follow-up
9 questions based on Mr. Hibey's portion of the cross-
10 examination which focused on these documents,
11 primarily Mr. Miller's notes and the OI investigation
12 index and Mr. Martin's notes.
13 JUDGE FARRAR: That's a brilliantly
14 logical idea, but Mr. Hibey is shaking his head. I
15 understand why you proposed it. It's not an
16 unreasonable idea, but this is his cross-examination
17 and he's permitted to go ahead as he wants.
18 MR. HIBEY: May it please the Court, my
19 intention is not to hit all nine factors because I
20 think in the main they have been covered quite amply.
21 There are a couple of things that I would like to talk
22 about with the witness.
23 JUDGE FARRAR: Go right ahead.
24 MR. HIBEY: Hopefully that will cut down
25 on the cross.

1 CROSS EXAMINATION (Resumed)

2 BY MR. HIBEY:

3 Q Mr. O'Brien, with respect to the factor of
4 training and experience, it reads in the policy, "The
5 individual's training and experience, as well as
6 knowledge of the potential consequences of the
7 wrongdoing."

8 Putting aside training and experience
9 because it is what it is in this record, would you
10 agree that knowledge of the wrongdoing must come
11 before knowledge of the consequences of the
12 wrongdoing?

13 A I think the factors are part of the
14 discussion when we're looking at sanctions, and so it
15 pre-assumes that as part of the process of coming to
16 that perspective that we've looked at does the
17 individual have knowledge of the information, the
18 right information, for example, and does the
19 individual then take action to deliberately provide
20 incomplete or inaccurate information.

21 Q So your answer is yes.

22 A I believe so, yes.

23 Q All right. Now, we've heard testimony
24 from you today about the activities of the regional
25 office having jurisdiction, if you will, over Davis-

1 Besse during your direct, and just very quickly, we
2 have, as you say or as you said, the resident
3 inspectors.
4 And this, Your Honor, I think there are
5 different ways to pigeonhole this exchange, but
6 perhaps what brings it to mind is the witness'
7 reference to the Factor No. 9.
8 JUDGE FARRAR: Fine. Go ahead.
9 BY MR. HIBEY:
10 Q In Factor No. 9 he said, did you not, that
11 the discovery of this misconduct was by the NRC as
12 opposed to the company making the disclosure; is that
13 right?
14 A Yes.
15 Q And if I remember your testimony
16 correctly, you said that there had been a discovery by
17 the NRC, and that there had been lessons learned that
18 the NRC did in its own examination of the situation;
19 is that right?
20 A The NRC, following the issues at Davis-
21 Besse, conducted a lesson learned internally to
22 discern what additional factors, what additional
23 actions we ought to take as an agency to help insure
24 that this type of situation from our perspective
25 didn't occur again.

1 Q And they found no misconduct on the part
2 of anybody at the NRC.
3 A I would have to refresh my memory regard
4 to the results specifically.
5 Q Well, let me see if I can refresh your
6 recollection with the reference to a document that I
7 have not multiply copied, and therefore I'm offering
8 it to refresh your recollection.
9 Do you recall the communications plan
10 associated with the issuance of the notice to the
11 affected parties of their debarments, a plan that was
12 written on December 23rd, 2005?
13 A I recall that in the process of preparing
14 to issue the orders, we did develop a communication
15 plan, yes.
16 Q And were you the author of that particular
17 plan?
18 A I was involved in its preparation.
19 Q And do you remember that there was a
20 question and answer section that anticipates questions
21 and answers that might be asked of the NRC once this
22 thing goes public; is that right?
23 A I remember that we were -- we normally do
24 that. So I would believe it would be there also, yes.
25 Q So there was a -- do you recall an answer

1 -- the question was, "What about NRC employees? What
2 actions are you taking against them?"
3 And the answer was, "As a result of the
4 Davis-Besse event, a lessons learned task force was
5 commissioned to review the circumstances that led up
6 to the event from the aspect of regulatory performance
7 by the NRC. The task force did not identify any
8 examples of NRC Staff misconduct."
9 A I'll believe that that's what you say it
10 says. Yeah, that would seem consistent with my
11 understanding.
12 Q All right. The lessons learned task force
13 was conducted by people attached to the agency who
14 were, in fact, involved with the monitoring and
15 supervision of Davis-Besse; is that correct?
16 A I can't attest to that, no.
17 Q Okay. You would make a distinction, would
18 you not, between the lessons learned task force and
19 its work and the work of the Office of the Inspector
20 General of the Nuclear Regulatory Commission; isn't
21 that correct?
22 A I'm not sure who was involved in lessons
23 learned task force. The Office of the Inspector
24 General has a different role and function.
25 Q All right.

1 A If that's the question you're asking.
2 Q That is the question.
3 A Okay, yeah.
4 Q Thank you.
5 A Yes, I would agree with that.
6 A Thank you for the answer.
7 And, indeed, the Office of the Inspector
8 General is understood to be an independent
9 organization; isn't that correct?
10 A My understanding, yes.
11 Q It has the same independence as, for
12 example, the administrative law clerk of this agency;
13 isn't that correct?
14 A I'm not versed enough well enough to be
15 able to articulate, but I'll buy into that answer if
16 that's --
17 Q All right. You understand that the
18 Inspector General conducted an event inquiry in this
19 matter, don't you?
20 A I don't recall specifically, no.
21 MR. HIBEY: All right. Number next, Andy.
22 Thank you.
23 Have you got three there? No, it's 27.
24 We missed 26.
25 (Whereupon, the document referred to was

1 marked as Geisen Exhibit No. 27 for iden-
2 tification.)
3 BY MR. HIBEY:
4 Q I'm handing you what has been marked
5 Defense 27, which is --
6 JUDGE FARRAR: Mr. Hibey, just so the
7 record is clear, I heard you say to Joanna there's no
8 Exhibit 26.
9 MR. HIBEY: Right, Your Honor.
10 JUDGE FARRAR: Okay. That's fine. Just
11 so I know.
12 MR. HIBEY: We skipped a number.
13 JUDGE FARRAR: That's fine.
14 BY MR. HIBEY:
15 Q This is a document of the NRC entitled
16 "Office of the Inspector General, Semi-annual Report
17 to Congress." I want to direct your attention to page
18 12 of that document referencing investigative case
19 summaries involving NRC's oversight of the Davis-Besse
20 boric acid leakage and corrosion during the April 2000
21 refueling outage.
22 Now, sir, have you had a recollection that
23 the Inspector General conducted such an inquiry?
24 A I see it here in front of me.
25 Q Do you have any recollection based upon

1 the work of the Inspector General in obtaining
2 information from Region 3?
3 A I'm sorry. Could you rephrase that? I --
4 Q Do you have any recollection of the Office
5 of the Inspector General going out to Region 3 and
6 conducting investigation?
7 A I personally wasn't knowledgeable of it,
8 no.
9 Q You never knew that this occurred.
10 A I was not involved in the activity. So I
11 wouldn't have specific knowledge of those activities,
12 no.
13 Q So do you know that the Inspector General
14 as a result of his work in inquiring into the
15 circumstances of this event reached certain
16 conclusions about what transpired?
17 A I would assume that to be the case.
18 Q All right. With a focus now on the
19 conduct of the NRC Staff and offices; is that correct?
20 A Well, I would assume that the Office of
21 the Inspector General would be evaluating our
22 activities, yes.
23 MS. CLARK: Once again, I have to object.
24 This is completely immaterial, what the Office of --
25 OIG investigated about conduct of the Staff.

1 JUDGE FARRAR: Well, that's not how I
2 understand from a quick glance at where Mr. Hibey is
3 going, that would not be my impression.
4 Go ahead, Mr. Hibey. Objection overruled.
5 BY MR. HIBEY:
6 Q Now, sir, there were certain findings that
7 were made: one, that the -- and I'll ask you to look
8 at the bottom of these as a result of the inquiry, and
9 what I'm going to do is paraphrase. So if I'm really
10 off, I'm sure you'll want to tell me that -- that,
11 one, the NRC Headquarters had raised generic
12 communications regarding nozzle penetrations, but
13 never told the region or the regions about them.
14 A That's not what I read, sir.
15 Q Okay.
16 A Let me read it if you wouldn't mind.
17 Q Go ahead.
18 A NRC Headquarters did not integrate issues
19 raised in generic communications pertaining to effects
20 of boric acid corrosion in reactor pressure vessel
21 head penetration into the NRC's inspection program.
22 Consequently, there was no requirement from NRC
23 Headquarters for the NRC regions to inspect licensee
24 programs established in response to the generic
25 communications.

1 Q All right, and then the next one, there
2 was ineffective communication between Headquarters and
3 Region 3 regarding leakage and corrosion.
4 A Again, it says there were ineffective
5 communications among Region 3 managers. It doesn't
6 mention Headquarters at all.
7 Q All right. I'll accept that. Thank you.
8 And appropriate to that, Region 3 managers
9 have received numerous accounts of boric acid and
10 corrosion from the site; is that correct? From the
11 on-site resident inspectors?
12 A It says that, yes.
13 Q All right. But they didn't direct the
14 resident inspectors to inspect or follow up on the
15 information during the 12RFO; is that right?
16 A That is what it says.
17 Q Now, I want to stop you before I get to
18 the next bullet. Do you know Doug Simpkins?
19 A Yes, I do know Mr. Simpkins.
20 Q Who is Doug Simpkins?
21 A My recollection is Mr. Simpkins is
22 currently an NRC employee working in the technical --
23 in our Chattanooga Training Center.
24 Q There was a time when he was a resident
25 inspector at Davis-Besse; isn't that right?

1 A That is my understanding, yes.

2 Q In the course of your becoming familiar

3 with these issues, are you aware that Mr. Simpkins as

4 resident inspector at Davis-Besse received a copy of

5 the red photograph?

6 A No, I am not aware of that.

7 Q All right. Let's look at the finding and

8 put aside the name Doug Simpkins. "The Davis-Besse

9 senior resident inspector and resident inspector and

10 possibly a Region 3-based operator reviewed Davis-

11 Besse CR-2000-0782 during 12RFO. However, these

12 inspectors did not recognize the significance of the

13 boric acid corrosion described in the condition

14 report."

15 Did I read that correctly?

16 A Close.

17 Q All right. And the last finding that I'm

18 going to direct your attention to appears at the top

19 of page 13. "Region 3 inspectors at Davis-Besse did

20 not relay the information depicted in CR-2000-0782 to

21 Region 3 managers. Consequently, the information was

22 not provided to NRC Headquarters staff and was not

23 considered in NRC's November 2001 decision to allow

24 Davis-Besse to operate past December 31st, 2001."

25 Did I read that accurately?

1 A Yes, sir.

2 Q Were you aware of the findings of the

3 Inspector General --

4 A Generally.

5 Q Generally?

6 A Generally. I did not personally review in

7 detail the Inspector General's report.

8 Q But you have your general familiarity with

9 the findings embodied in this report are covered here,

10 are they not?

11 A The findings we just read --

12 Q Yes.

13 A -- are findings I was familiar. I didn't

14 know exactly how they occurred or what the result was,

15 but I was familiar in general with those comments.

16 Q Did you take into consideration the

17 findings of the OIG into what you decided about the

18 credibility and integrity of the information you were

19 considering and on the sanctions that you ultimately

20 imposed on Mr. Geisen?

21 A I'm not sure I understood or at the time

22 or even today draw a correlation between the

23 information in the IG's report and the credibility of

24 the information provided us by the Office of Inspector

25 -- of the Office of Investigations.

1 Q All right. Now, sir, do you think that
2 trust is an important element among professionals,
3 professional co-workers, who have the responsibility
4 of running the nuclear plant?
5 A I think trust is an important factor, in
6 general, yes.
7 Q And it wouldn't surprise you, would it, if
8 one worker trusts another co-worker to tell him the
9 truth about work he's been assigned?
10 A No, it wouldn't surprise me in the least.
11 Q And if the worker is told by his trusted
12 colleague that there's no leakage, for example, you
13 wouldn't blame the worker as a liar if it turned out
14 not to be the case, would you?
15 A In the role that I currently serve, sir,
16 and the role I've generally had as an individual in
17 the NRC, there's trust but verify. The level of
18 verification due is a function of the significance of
19 the information you're about to trust.
20 The significance of the leak of the
21 reactor vessel head is one that I would trust but
22 verify.
23 Q I take it that you applied the same
24 standard of trust but verify when you took a look at
25 the information that was contained in the Office of

1 the Inspector General's report -- Office of Inspector
2 -- Office of Investigation's report?
3 A We used that same type of approach as we
4 went through the information, yes, sir.
5 Q And the lessons learned task force also
6 found no misconduct on the part of your people.
7 A As I said, I have not read the report in
8 detail. I can't give you an absolute answer in that
9 regard.
10 MR. HIBEY: Okay. Now, I'm going to pass
11 on a number of these, Your Honor. Shall we say we've
12 got what information that came out of those colloquies
13 for our own use in the case.
14 BY MR. HIBEY:
15 Q I want to talk about Mr. Geisen's
16 attitude. At some point in here you said that a
17 person had to be contrite. You were looking for the
18 willingness and the desire to comply with the
19 requirements in the future before you would credit
20 that person with the acceptance of responsibility. Do
21 you recall that testimony on direct examination?
22 A To some degree, yes.
23 Q Now, in the course of your coming to your
24 conclusions, you reviewed the entirety of Mr. Geisen's
25 testimony before the Office -- before the Office of

1 Investigations; isn't that correct?

2 A The information was reviewed as a part of

3 our process. That's correct.

4 Q Yes, all right. And you know that he

5 accepted responsibility back then for not having been

6 more careful in checking closely the accuracy of

7 information that was provided to the NRC. You know

8 that, don't you?

9 A I would have to refresh my memory

10 specifically what it says in his testimony, sir.

11 Q All right. I've just taken an excerpt.

12 It's in 25 and you have it already.

13 A Where would you like me to read?

14 Q Well, go to the last page of the exhibit

15 because the first page has merely tried to secure the

16 preliminaries of identifying the document. It's this

17 last page I'm interested in in it.

18 There is an exchange between Resident

19 Inspector Gavula and Mr. Geisen. They're apparently

20 talking about the table that -- you understand what

21 we're talking about when we talk about the table.

22 A Yes, sir.

23 Q All right. Thank you.

24 And at Line 10 Inspector Gavula says in

25 pertinent part, "That table is not a document that was

1 generated as part of a separate" --

2 And Dave says, "You're correct."

3 And Gavula says, "-- process. So the

4 question is who was supposed to check to insure the

5 accuracy of that information?"

6 To which Dave says, "That would probably

7 have been me. Had I done probably a better job of

8 checking that information, I probably would still be

9 in my job that I was in previously."

10 Now, recognize that at that point in time

11 no one every told him that he was the target of any

12 prosecution, that he came in and gave his testimony

13 for at least 173 pages. I think it probably went for

14 a few more pages after that. So there's no need for

15 him to express the kind of contrition that you

16 reported in your direct examination because the person

17 who was contrite there also said he was -- he was

18 wrong.

19 This man, realizing the situation, says,

20 you know, "I probably should have done a better job."

21 Don't you think that that's evidence of an acceptance

22 of responsibility for what happened at Davis-Besse

23 while he was there?

24 A It addresses it in part.

25 Q I take it, based upon what you've said

1 here today, that you do not consider Mr. Geisen as
2 ever having expressed acceptance of responsibility for
3 the failures which occurred that led to the report
4 being written in the way it was.
5 A I have not heard that, no.
6 Q All right, and certainly, the statement
7 that I drew out from this excerpt is not anything that
8 you recall having read or considered during the time
9 that you were looking at these materials.
10 A I don't recall it, no.
11 Q All right. Now, you also know that he
12 always maintained his innocence of the criminal
13 charges. That's something that you know; isn't that
14 right?
15 A I don't know that he maintained his
16 innocence always, no.
17 Q You don't know that he went to trial?
18 A I do know that he went to trial. You
19 asked if I knew that he always, to use that word,
20 maintained his innocence. I don't know that.
21 Q All right.
22 JUDGE FARRAR: Wait a minute. Most people
23 don't go to trial after they plead guilty. What are
24 you trying to tell us here?
25 THE WITNESS: I don't mean to parse words,

1 Your Honor. He said --

2 JUDGE FARRAR: Well, you did.

3 THE WITNESS: I parsed words because he

4 used the word "always." What I'm saying is I don't

5 know if he's changed from the time he was originally

6 charged, he went through the trial, until today. I

7 don't know that. I know that he was charged. I know

8 that he was convicted. I have not kept track of any

9 statements Mr. Geisen has made one way or the other

10 throughout the process.

11 JUDGE FARRAR: Well, would he be here

12 today if after being found guilty by the jury he had

13 said, "You finally got me"?

14 THE WITNESS: My understanding the reason

15 we're here today is because he is contesting the

16 length of the sanction.

17 JUDGE FARRAR: Would --

18 THE WITNESS: And its reasonableness.

19 JUDGE FARRAR: No, he's contesting the

20 imposition of the -- he's contesting the finding of

21 guilt. He's stipulated a lot of things about

22 documents not being true, but he's contesting the

23 finding of guilt and the sanction. Today we're

24 talking about the sanction, but all week we were

25 talking about the finding of guilt.

1 If he admitted that the jury finally
2 figured it out and found him guilty under a beyond a
3 reasonable doubt standard, which you don't have to be
4 a lawyer to understand, he wouldn't be here today I
5 don't think saying, "Well, the jury got me but maybe
6 I can fool you."
7 THE WITNESS: I understand your point,
8 Your Honor.
9 BY MR. HIBEY:
10 Q Well, let me ask you a question to see if
11 we can point that up just one more step. Your
12 communications plan for notification of Mr. Geisen and
13 others of the action that you're going to take was on
14 December 23rd, 2005, according to the plan date, and
15 are you aware that in late October or early November
16 Mr. Geisen was offered the deferred prosecution
17 agreement by the Department of Justice that would have
18 required him merely to admit that he had lied to the
19 NRC in return for which he wouldn't be prosecuted at
20 all?
21 A I'm aware of that.
22 Q You were aware of that, were you not, at
23 the time that the ultimate movement had been initiated
24 to debar him; isn't that correct?
25 A I was aware at the time that there were

1 discussions ongoing with the Department of Justice.
2 I don't know that I can recall that I was aware of
3 specifics with that regard, but I knew that there were
4 discussions ongoing at that point in time.
5 Q But here's the time sequence. You tell me
6 if you dispute it.
7 A Sure.
8 Q In November, late October, early November,
9 the Government -- I say "the Government." I mean the
10 Department of Justice in this case --
11 A Thank you.
12 Q -- let's make it the prosecutors, although
13 Chief Justice Rehnquist would not be pleased with that
14 characterization.
15 The prosecutors offer him a DPA, deferred
16 prosecution agreement. It is turned down. In
17 November and into December, you all at the NRC begin
18 the process of planning to debar him. He is debarred
19 on the 6th -- on or about the 6th of January 2006.
20 There's a connection, isn't there, between
21 his refusal to admit that he lied to the NRC and the
22 decision to debar him because he wouldn't accept a
23 DPA?
24 A No.
25 Q That was no evidence of a lack of

1 acceptance of responsibility to you?

2 A It was not a part of the decision making

3 process that we utilized.

4 Q So it was just a coincidence that on or

5 about the -- in the December time frame, after he had

6 turned it down, the DPA down, and you knew it, that

7 this movement was undertaken ultimately to debar

8 effectively immediately?

9 A I think I answered your question. It had

10 no impact that I'm aware of, and I developed the

11 action. So I would be the one who would be most

12 likely to be impacted on that.

13 Q So is it just a mere coincidence that your

14 knowledge that he refused to accept a deferred

15 prosecution agreement whereby he accepted

16 responsibility for lying to the NRC; that it was a

17 mere coincidence that that refusal would occur before

18 you folks initiate the plan to announce his debarment,

19 and then to do it effective immediately? That's a

20 coincidence?

21 A As I indicated to you, his actions with

22 the Department of Justice had no impact on my decision

23 to recommend as a part of our review of the material

24 and the timing of our action that I'm aware of, not at

25 all.

1 Q Although you knew about it --

2 A I was aware --

3 Q All right.

4 A -- at the time that there were discussions

5 ongoing between the Department of Justice and a number

6 of individuals, and I was never told who those number

7 of individuals were relative to those activities.

8 MR. HIBEY: Your Honor, indulge me a

9 moment. I'd like to confer with counsel, and I want

10 to just check my notes to see if there's anything else

11 I'd like to touch upon.

12 JUDGE FARRAR: Go ahead. Go ahead, Mr.

13 Hibey.

14 (Pause in proceedings.)

15 MR. HIBEY: I have nothing further of this

16 witness.

17 JUDGE FARRAR: Thank you.

18 MR. HIBEY: Thank you, Your Honor.

19 JUDGE FARRAR: Mr. Hibey, I have two quick

20 questions. The first one is on Mr. Geisen's Exhibit

21 22, the memo that went up to the Commissioners, to

22 your knowledge was there a meeting with the

23 Commissioners about this?

24 THE WITNESS: I can't answer you

25 absolutely, Your Honor. My recollection is there was

1 discussion of having a TA brief. I don't recall
2 directly whether or not we actually had a meeting with
3 the Commissioners or we just did a TA brief or we just
4 walked it around because I know the discussion was
5 held. The dialogue was that we might do one of the
6 above, and I can't remember specifically because it
7 would have been done here in Headquarters and I was in
8 the region. So I would have only been peripherally
9 concerned with that.
10 JUDGE FARRAR: When I was asking questions
11 this morning which ended with Mr. Virgilio, would it
12 have been helpful, convenient for you to tell me it
13 didn't end with Mr. Virgilio and there was -- I'm not
14 suggesting any of this is nefarious, but would it have
15 been helpful to tell me that it didn't end with Mr.
16 Virgilio?
17 THE WITNESS: If I might take a moment to
18 explain, Your Honor. In all of our enforcement
19 actions that involve an order to an individual or a
20 civil penalty to a licensee, we make a notification to
21 the Commission at all times.
22 JUDGE FARRAR: I understand that. That's
23 not what I asked you. What I asked you --
24 THE WITNESS: I'm sorry.
25 JUDGE FARRAR: -- when I came here this

1 morning I didn't know anything about this process. So
2 I asked you a whole lot of questions about how we went
3 from top to bottom on this, and at no time did I hear
4 the word "Commissioners" or "technical assistants."
5 I'm not suggesting they don't have a right to be
6 involved. I'm suggesting that I wasn't told by you.
7 THE WITNESS: Let me apologize, Your
8 Honor, if I misled you in any degree. My
9 understanding, this process is an informing process.
10 JUDGE FARRAR: Yeah.
11 THE WITNESS: The decision has already
12 been made, and it's the opportunity for the Commission
13 to tell us, "Hold it. stop." So it's not a part of
14 -- of, if you will, getting their concurrence. It's
15 a part of them being able to say, "Hold it. Stop. We
16 think there's something not right here," that sort of
17 thing.
18 By the time we're doing the assistants and
19 notification to allow them to tell us to stop, and
20 usually it's a three-day EN is what we call it to give
21 them the information -- so the decision is already
22 made, and I apologize if I wasn't clear with that
23 earlier.
24 JUDGE FARRAR: All right. Next time say,
25 well, it kind of stops with Mr. Virgilio, but not

1 really.

2 THE WITNESS: Understood.

3 JUDGE FARRAR: On the --

4 THE WITNESS: I hope to not have the

5 pleasure of this interaction again.

6 JUDGE FARRAR: Funny. A lot of people say

7 that.

8 THE WITNESS: I understand your role, sir.

9 JUDGE FARRAR: And that's one reason why

10 we announce -- at least I do -- at the beginning of

11 every hearing that we're independent of everybody

12 because we don't care whose toes we step on, and we

13 don't get fired or challenged for stepping on them.

14 The last two pages of that memo to the

15 Commissioners is the strategy form about Mr. Geisen,

16 I think. Oh, no. About the -- oh, no, it's the

17 technical services director.

18 So only one was attached. I was noting

19 that the write-up of it was different. The back page

20 write-up was different from the write-up that Mr.

21 Ghasemian is going to give me some time as an exhibit.

22 I was going to ask you about why it was different, but

23 it's about a different person. So that's okay.

24 THE WITNESS: If I may add one other piece

25 of knowledge, Your Honor, that I was wondering about

1 but didn't have, if you look at -- and I'm trying to
2 make sure I'm positive in this with this regard -- a
3 couple of things is the process for taking this action
4 is up in the upper right left-hand corner, 8/18/05.
5 JUDGE FARRAR: Un-huh.
6 THE WITNESS: That's when we start. The
7 actual item was signed off on 12/07/05. So it gives
8 you a perspective of how we worked our way through the
9 process, and I wanted to make sure you were aware of
10 that.
11 JUDGE FARRAR: Okay.
12 THE WITNESS: As it relates to the dates
13 and activities.
14 JUDGE FARRAR: So who signed off on
15 12/7/05? It's the Director of OE.
16 THE WITNESS: Or their designee.
17 JUDGE FARRAR: Okay.
18 THE WITNESS: And I can't tell you that
19 handwriting to be very frank with Your Honor.
20 JUDGE FARRAR: After this is signed off
21 on, that we need to immediately protect the nation
22 from these people, they roamed around the country for
23 another month. Not only did they roam around the
24 country. They roamed around nuclear power plants or
25 wherever they were, and we were at risk for that

1 month. That's not a question.

2 Well, yeah, let's talk about that

3 specifically because here the order was done and it

4 was immediately effective. It was done.

5 THE WITNESS: Once we documented it and

6 went through the process and had all of the reviews

7 necessary to issue it. We do have the ability, Your

8 Honor, just to give you a full flavor of the picture,

9 if we receive information in the agency of an

10 individual who has a direct ability to affect safety

11 with their own actions and nobody else's involvement,

12 we can and have taken action immediately, and when I

13 say "immediately," I mean in the terms of minutes and

14 hours.

15 JUDGE FARRAR: Right, okay.

16 THE WITNESS: To accomplish that activity.

17 It changes with --

18 JUDGE FARRAR: Mr. Geisen was not one of

19 those people.

20 THE WITNESS: No. An example -- no, he

21 was not. One of those people would be somebody such

22 as a reactor operator --

23 JUDGE FARRAR: Right.

24 THE WITNESS: -- a radiographer, things of

25 that nature.

1 So we do have that capability and we have
2 done that. I don't mean to draw a difference with
3 your comment, only just to provide you more
4 explanation in terms of our capability and what we
5 have done in the past.
6 JUDGE FARRAR: Based on Mr. Hibey's cross-
7 examination, in the Inspector General report and the
8 internal report, what was that, AI?
9 THE WITNESS: OIG, I believe, sir.
10 JUDGE FARRAR: No, no, no, the other one.
11 THE WITNESS: Oh, the lesson learned task
12 force?
13 JUDGE FARRAR: Yeah, and there was another
14 one.
15 THE WITNESS: Oh, AIT was an inspection
16 conducted by the NRC of the licensee's activities.
17 JUDGE FARRAR: Of all these people in Ohio
18 and here and everywhere else in the country, who paid
19 the price for this accident?
20 THE WITNESS: Individually?
21 JUDGE FARRAR: Yes.
22 THE WITNESS: Individuals who took orders
23 against, Your Honor.
24 JUDGE FARRAR: No, no. Who has borne the
25 burden of this? Not Mr. Goyal. He was off in another

1 job. Mr. Siemaszko was somewhere else. Mr. Miller
2 and Mr. Moffitt came in here -- oh, thank you. Mr.
3 Miller.
4 THE WITNESS: Yes, sir.
5 JUDGE FARRAR: The three of us signed an
6 order about Mr. Miller a year or two ago saying he
7 doesn't need the five years. You all have agreed that
8 he needs something else and has to go make some
9 speeches.
10 Were we informed at that time of Mr.
11 Miller's notes?
12 THE WITNESS: Were you, the Board,
13 informed?
14 JUDGE FARRAR: Yeah. When Staff counsel
15 came to us with Mr. Miller's counsel and said, "We've
16 struck a new deal and we now have renewed faith in Mr.
17 Miller," and we were asked to sign that and we write
18 a little opinion saying Staff warrants Mr. Miller is
19 okay. So we're fine. Were we told about his notes?
20 THE WITNESS: No, sir, I do not believe
21 you were provided that information.
22 JUDGE FARRAR: Do you think if we were
23 told about them we might have had a little hearing
24 about that?
25 THE WITNESS: I believe you might have,

1 yes, sir.

2 JUDGE FARRAR: I withdraw my apology from

3 the other day when I apologized to people for being

4 upset about Mr. Miller's notes and letting it be

5 visible. I'm more upset than I was then.

6 JUDGE HAWKENS: Proceed.

7 JUDGE FARRAR: They take turns settling me

8 down. Thank you, Judge Hawkens.

9 THE WITNESS: One other item if I may,

10 Your Honor.

11 JUDGE FARRAR: Yes.

12 THE WITNESS: I indicated to you I'd get

13 information when I went to lunch. I did not get that

14 information. I still owe it to you. I will get back

15 to you on that.

16 JUDGE FARRAR: Okay. Mr. Ghasemian, you

17 may redirect.

18 MR. GHASEMIAN: Thank you, Your Honor, and

19 I'll try to be --

20 JUDGE FARRAR: Yeah. I don't want to hear

21 anything again. If he said it before, he said it.

22 MR. GHASEMIAN: Okay.

23 JUDGE FARRAR: If there's something you

24 can bring out that responds to the cross, fine, but I

25 don't want to hear him say again what he said before

1 the cross.

2 MR. GHASEMIAN: Fair enough.

3 REDIRECT EXAMINATION

4 BY MR. GHASEMIAN:

5 Q Go to Mr. Martin's notes, Staff Exhibit

6 63. Mr. O'Brien, you remember talking to Mr. Hibey.

7 He was asking you questions about the sentence in the

8 fourth paragraph, the first sentence starting with "I

9 know"?

10 A Yes.

11 Q And you testified that it could be read

12 two different ways?

13 A Yes.

14 Q What are the two ways it could be read?

15 A (Examining document.) I read it when I

16 read it initially and quickly that you could read it

17 that he was doing the preparing in August of 2001 for

18 NRC interactions at some indeterminate time.

19 Q So that's one interpretation?

20 A Right.

21 Q Okay. What's the second way to read it?

22 A The second one is that he did in preparing

23 for the interactions which actually occurred in August

24 2001. So his preparation would have come some time

25 before that.

1 Q So what's the latest that he could have
2 been watching the videos reading either
3 interpretation?
4 A The latest would be August of 2001.
5 JUDGE FARRAR: If you were aware of
6 evidence in this case that Mr. Geisen had nothing to
7 do with the NRC actions until October, would that
8 change your opinion of how you read that sentence?
9 THE WITNESS: That would impact. That
10 would impact my assessment. Yes, Your Honor.
11 BY MR. GHASEMIAN:
12 Q Going on to Mr. Miller's notes, and that
13 was, I believe -- let's see. Well, I can just ask you
14 questions about it. We don't have to go to it.
15 Now --
16 A If I may--
17 Q Go ahead.
18 A -- I call him Shry (phonetic). I
19 apologize.
20 I want to go back, Your Honor, to the
21 point that you made. You said if I knew through other
22 evidence provided here that he had no interactions
23 with the NRC until October of 2001 --
24 JUDGE FARRAR: And was not assigned any
25 aspect of the project in August.

1 THE WITNESS: In August. Are you making
2 the inference that he would have -- that the statement
3 that he actually reviewed the tapes in August of 2001
4 is not incredible?
5 JUDGE FARRAR: Yes. We talked about. I
6 don't know if you were here when we talked about that,
7 but we found at least the evidence would support a
8 reconciliation of his testimony and Mr. Martin's that
9 maybe Mr. Geisen said, you know, "I looked at the
10 tapes because this bulletin had come in in August, and
11 when I was getting ready to deal with it, I looked at
12 the tapes."
13 So Mr. Martin could have written down,
14 since he wasn't taking verbatim notes, he could have
15 written down subject looked at them in August.
16 And so that may be a way to reconcile
17 without calling either one of them a non-truth teller,
18 that that's how they, those two could be reconciled.
19 And that's why Mr. Hibey asked today about Mr.
20 Martin's notes in the absence of any opportunity from
21 your people having those notes to give Mr. Geisen a
22 chance to say, "Is that what you told Mr. Martin
23 before you gave him a five-year ban?"
24 THE WITNESS: That would have the
25 potential to influence our --

1 JUDGE FARRAR: That would what?

2 THE WITNESS: That, that fact would have
3 the potential to influence, but it would be one factor
4 among all the other pieces, and it goes back to the
5 dialogue, Your Honor, if I may for just a moment, that
6 I had with you earlier. I heard many things over the
7 last day and a half that if I were recrafting this
8 action today I would be looking into further because
9 they are different pieces of information which still
10 raise the same level of concern in my mind.

11 I don't have all the answers regarding
12 them. I don't know all of the facts regarding them,
13 but there are different pieces of information.

14 JUDGE FARRAR: That wouldn't be a post hoc
15 attempt to justify an order that you're beginning to
16 wonder about whether it was correct?

17 THE WITNESS: Oh, not at all, Your Honor.
18 What it is is me trying to be honest with you in the
19 sense that you asked me to sit here for a day and a
20 half, and so I've spent a day and a half wondering how
21 I could add value to this proceeding.

22 JUDGE FARRAR: That's --

23 THE WITNESS: And part of that dialogue
24 was looking at it. I'm an enforcement officer. I do
25 that, and I'm very critical about what I do and how I

1 do it, and I force the staff to be very critical about
2 what they do, and I don't take any of my actions
3 lightly, especially those that involve individual
4 actions.
5 So I'm looking for where there are either
6 pluses or minuses to what we did and the information
7 we had. Over the last day and a half, I heard new
8 information that I was not aware of in direct
9 testimony from Mr. Geisen that I didn't know. Now I'd
10 have to take that new information into consideration
11 with all of the other information and figure out what
12 I did -- what the right answer would be based upon
13 that.
14 But I did hear new information that would
15 cause me concern. I don't know that that's the right
16 answer in the end because I haven't evaluated it.
17 JUDGE FARRAR: But you also heard new
18 information that would cause you concern --
19 THE WITNESS: New information that would
20 cause me to question other pieces of knowledge to make
21 sure I fully understood where they did or didn't stand
22 in the overall process.
23 JUDGE FARRAR: That's a fair comment, and
24 you did, in fact, in that day and a half do exactly
25 what we asked you to do. So we appreciate that.

1 THE WITNESS: I appreciate. Without
2 knowing why you asked me to stand here, I appreciate
3 I was able to accomplish that here.
4 JUDGE FARRAR: Go ahead, Mr. Ghasemian.
5 MR. GHASEMIAN: Thank you, Your Honor.
6 BY MR. GHASEMIAN:
7 Q Now, the information -- I'm a little
8 confused about what you're saying. Is that the new
9 information that you learned, is it --
10 JUDGE FARRAR: No, we got that. We got
11 that. We understand that. Well, go ahead.
12 JUDGE HAWKENS: I'd like to hear the
13 question, please, and the answer.
14 JUDGE FARRAR: Okay. Go ahead. I'm
15 sorry.
16 BY MR. GHASEMIAN:
17 Q You say that you learned new information
18 and it causes you concern. Now I'm kind of wondering
19 is it causes you concern that you didn't make the
20 right decision or causes you concern that I'm more
21 confident in the decision that I made? Which -- if
22 those were the two scenarios on the spectrum, which
23 way -- are you more confident that you made the right
24 decision or less confident that you made the right
25 decision based on the new information that you

1 learned?

2 A I am -- I am comfortable with the decision
3 we made. However, I heard new information here that
4 would both cause me more concern and other information
5 that I'd like to look into. If I was recrafting the
6 action today to insure that I had all of the proper
7 facts and the proper manner, there are new pieces of
8 information that I think go directly -- I'm sorry.
9 I'm talking to him. I apologize.

10 There are new information that I heard
11 that I think goes directly to the reasons why we wrote
12 the order that would tend to reinforce my concern for
13 writing the order. There are other pieces of
14 information that I'd like to further -- I would, if I
15 was writing it again today, I would like to further
16 ask additional knowledge so that I could address those
17 aspects of it.

18 I am comfortable as I sit today with the
19 order we wrote and why we wrote it. However, there
20 are additional pieces of information I heard earlier
21 that I think I could easily -- let me rephrase that --
22 that I could look into, gather the additional
23 knowledge, and further demonstrate the first factor of
24 the two pieces, that he had knowledge prior to being
25 involved in providing responses to those letters

1 separate from and in addition to the information that
2 was included in the order. I didn't have Mr. Geisen's
3 direct testimony on a number of documents, and in the
4 process that we went through, I held a very high
5 standard for what evidence we would use to demonstrate
6 that somebody had knowledge prior to taking an action.
7 JUDGE FARRAR: But you left out of this
8 answer just now that there was information you've
9 learned about casting doubt on the legitimacy of old
10 information you relied on in crafting the original
11 order.
12 THE WITNESS: I was just about to go
13 there, Your Honor. My apologies for not getting there
14 sooner.
15 JUDGE FARRAR: Okay. Go ahead. That's
16 fine.
17 THE WITNESS: There was also that I heard
18 today that would draw into question some of the
19 different aspects of the information I became aware
20 of. So those are things I'd look into.
21 I personally have a difficulty with notes
22 taken by an individual that somebody else doesn't
23 verify are factual before they finish. I would have
24 to look into -- that doesn't say it's inadequate or
25 inappropriate, but that causes me some concern.

1 But I need to be -- I need to express that
2 this is an action that involves lots of different
3 pieces of data. There's no one single piece of data
4 that in and of itself drove it that I can think of off
5 the top of my head. I mean, if I sat and looked at
6 it, I can say this had -- these three, four, five
7 pieces of data were crucial, but I don't think there
8 was any one.
9 And I heard things today that would add to
10 it, and you're correct, Your Honor. I heard things
11 today I would want to look into further because it
12 raises some questions in my mind.
13 My job is like yours, to be fair, and it
14 doesn't make a lot of people happy in my office when
15 I tell them, no, we can't go there, but that's my job.
16 MR. GHASEMIAN: Thank you, Mr. O'Brien.
17 BY MR. GHASEMIAN:
18 Q Now, going back to Mr. Martin's notes, in
19 August was the October 3rd teleconference as far as
20 you know, was that scheduled in August?
21 A I have no knowledge of when they actually
22 scheduled it.
23 Q Okay. Now, going to asking you that
24 question about Mr. Miller's notes --
25 JUDGE FARRAR: Mr. Ghasemian, you're not

1 suggesting there's any evidence in the record that
2 would support that, are you?
3 MR. GHASEMIAN: No, but there's evidence,
4 Your Honor, that the --
5 JUDGE FARRAR: That the October conference
6 was scheduled in August?
7 MR. GHASEMIAN: No, there is no evidence
8 for that, Your Honor.
9 JUDGE FARRAR: Oh, okay.
10 MR. GHASEMIAN: I was hoping he would say,
11 no, it wasn't scheduled at all until after 9/28, but
12 there was interactions between the NRC and the
13 industry in August.
14 BY MR. GHASEMIAN:
15 Q Now, regarding Mr. Miller's notes, do you
16 remember talking to Mr. Hibey about those, the notes?
17 A Notes that were on the side of the
18 sheet --
19 Q Exactly.
20 A -- associated with an agenda?
21 Q Exactly. Now, do you know if -- do you
22 have any way of knowing whether the Office of
23 Investigations followed up on those notes?
24 A I don't know exactly how they handled
25 those notes, no.

1 Q Now, referring you to the index table of
2 the OI report that Mr. Hibey offered for the Board's
3 consideration, do you recall that table or do you have
4 it in front of you?
5 A I'm looking for it right now.
6 Q I believe it's Geisen Exhibit No. 23.
7 A Yes, I have it in front of me.
8 Q Did you have any involvement in writing
9 this report?
10 A No, sir.
11 Q You're not even in Office of
12 Investigations, are you?
13 A At the time this report was written, which
14 I believe was the spring of 2000 --
15 Q Were you ever in the Office of
16 Investigations?f page 211 of a long document, but it
17 probably refers to a particular section.
18 Do you know how the Office of
19 Investigation organizes their report? Do they have a
20 standard way of organizing information in their
21 reports?
22 A I'm not familiar with it. I can't answer
23 yes --
24 Q Okay.
25 A -- no or --

1 Q All right. Thank you.

2 And lastly, did there come a time that the

3 NRC received additional documents from any source in

4 relating to the Davis-Besse vessel head degradation?

5 A Yes, there was a time after we had

6 initially gone through all of our actions where we

7 received information from the license --

8 Q Actually, let me -- let me -- let me ask

9 it more precise.

10 After the issuance of the OI report in

11 August of 2003, did there come a time that the NRC

12 received additional documents from any source? And if

13 you know that, tell us when the NRC received

14 additional document.

15 A Yes, the NRC received additional documents

16 from the licensee that the licensee discovered, I

17 believe, if my memory is correct, in an office at

18 their facility that they believed stored records that

19 were formerly associated with Messrs. Cook and Wuokko.

20 Q So in your evaluation of all the

21 individuals, did you just solely rely on the OI report

22 and the exhibits that were cited in that report or did

23 you rely on those documents and exhibits and the

24 additional documents that you received?

25 A The latter of your two statements. When

1 we received the additional information, we reviewed
2 the additional information to discern whether or not
3 that would cause us to change our opinion.
4 Q So is it fair to say that the evaluation,
5 the conclusions that the agency reached weren't solely
6 within the corners of the OI report and the exhibits
7 that it cited? There was additional documents that
8 were considered as -- in consideration of all the
9 conclusions that it reached. Is that a fair
10 statement?
11 A Yes. We did consider documents in
12 addition to the OI reports.
13 MR. GHASEMIAN: If I may have a moment,
14 Your Honor.
15 (Pause in proceedings.)
16 MR. GHASEMIAN: No more questions, Your
17 Honor. Thank you.
18 JUDGE FARRAR: Thank you, Mr. Ghasemian.
19 Mr. Hibey, do you have any recross?
20 RECROSS EXAMINATION
21 BY MR. HIBEY:
22 Q With respect to the incident that you've
23 just described, that occurred in or about the summer
24 of 2006; is that correct?
25 A I can't tell you the exact time, but I'll

1 -- if you say that that's it, I'll believe you.

2 Q And it involved the company discovering

3 material, documents that were connected to the period

4 that had been under -- had been under investigation by

5 the OI.

6 A That's correct.

7 Q And the company made the disclosure to the

8 NRC that they had just found some additional boxes of

9 documents at their facility; is that correct?

10 A That is correct.

11 Q And do I have it also correct that

12 immediately the steps were taken to -- by the NRC --

13 to acquire those materials and to inquire into the

14 circumstances surrounding why these materials hadn't

15 been produced earlier pursuant to subpoenas --

16 A That is --

17 Q -- and other demands to --

18 A That's correct.

19 Q Is that correct?

20 A Yes.

21 Q And that was investigated by the OI; is

22 that right?

23 A The Office of Investigation did evaluate

24 that, yes.

25 Q And the conclusions which they reached are

1 embodied in one of these documents that the
2 Government, that the NRC turned over to us this week,
3 Your Honor.
4 Am I correct? You don't know that or --
5 A No, I don't know that. Thank you.
6 MR. HIBEY: If you'll indulge me a moment,
7 maybe I can find it. It's got to be over at my desk.
8 JUDGE FARRAR: Mr. Ghasemian was going to
9 offer to help you, I think or something.
10 MR. HIBEY: Well, he can if he'd like. If
11 you would just indulge me a moment, we've got 11 of
12 these things, I guess.
13 MR. GHASEMIAN: Mr. Hibey, did you find
14 it? I have a copy.
15 MR. HIBEY: I'm grateful. I have it.
16 Let's mark it. I think this is the document. Can we
17 mark it as what, number what? It's already stamped.
18 Just tell me the number.
19 Twenty-eight.
20 JUDGE FARRAR: Yes.
21 (Whereupon, the document referred to was
22 marked as Geisen Exhibit No. 28 for iden-
23 tification.)
24 BY MR. HIBEY:
25 Q I'm showing you what has been marked

1 Defense 28.

2 A Thank you, sir.

3 Q Ordinarily when I hand the witness an

4 exhibit I actually know what the document is, but

5 you'll have to explain what --

6 A The form you have --

7 Q -- SDT -- could you identify the document?

8 A The document is Significant Determination

9 Process/Enforcement Action Request and Strategy Form.

10 It's the document the agency uses to document the

11 results of an enforcement panel to document our final

12 decision.

13 Q Now, does this document address the

14 colloquy that you and I have just had about what

15 happened in the summer of 2006?

16 A Yes, it does. It's related to that.

17 Q And this is a -- this basically reports

18 what took place?

19 A Yes.

20 MR. HIBEY: Indulge me a moment.

21 (Pause in proceedings.)

22 MR. HIBEY: I have no further questions on

23 this document.

24 MR. GHASEMIAN: Your Honor, may I have one

25 follow-up question based on this document?

1 JUDGE FARRAR: First off I want to know
2 the names of the people. Mr. O'Brien, the last two
3 paragraphs it refers to the former contractor.
4 THE WITNESS: That would be Mr. Cook.
5 JUDGE FARRAR: And the last one is the
6 licensing supervisor.
7 THE WITNESS: That's Mr. Wuokko, I
8 believe. I'd have to look at his name and how to
9 pronounce it and spell it.
10 JUDGE TRIKOUROS: Who is the licensing
11 supervisor?
12 THE WITNESS: I think that -- I believe
13 that's Mr. Wuokko.
14 JUDGE FARRAR: W-u-o-k-k-o.
15 JUDGE TRIKOUROS: Oh, okay.
16 THE WITNESS: I think Judge Farrar has an
17 even better ability to spell it than I could.
18 JUDGE FARRAR: And you didn't know until
19 this week that Mr. Cook went to Mr. Goyal and say,
20 "Pony up the document"?
21 MR. GHASEMIAN: Your Honor, if I may
22 interject, at the risk of getting yelled at, but I
23 don't believe that the evidence supports that Mr. Cook
24 made the statement. We contend that it was, and I
25 think the testimony and evidence will support that Mr.

1 Siemaszko made the -- was the person doing the
2 persuasion, if I'm paraphrasing Mr. Goyal correctly.
3 JUDGE FARRAR: In the company of Mr. Cook.
4 MR. GHASEMIAN: In the company of Mr.
5 Cook.
6 JUDGE FARRAR: Thank you.
7 MR. GHASEMIAN: But it wasn't Mr. Cook
8 kind of doing the persuasion based on Mr. Goyal.
9 JUDGE FARRAR: Thank you for that
10 correction and thank you for not correcting my slang
11 also.
12 Mr. Hibey, you were done?
13 MR. HIBEY: Yes, Your Honor. I'm sorry.
14 I don't know how we quite got into that. I don't know
15 that you had passed the witness back to me.
16 MR. GHASEMIAN: No, I haven't
17 MR. HIBEY: Oh, no, no. I just wanted to
18 make sure you were done.
19 MR. GHASEMIAN: I believe I understood Mr.
20 Hibey to be finished.
21 JUDGE FARRAR: Yes. Go ahead, Mr.
22 Ghasemian.
23 MR. HIBEY: I'm sorry.
24 FURTHER REDIRECT EXAMINATION
25 BY MR. GHASEMIAN:

1 Q Mr. O'Brien, now these are the additional
2 documents that the NRC received in the summer of '05,
3 right? I mean, this reflects some of -- I mean, it
4 refers to some documents that refer to Mr. -- I guess
5 the former contractor and the licensing supervisor,
6 right?
7 A Yes. Only the correction is the summer of
8 '06. It says in July.
9 Q Does this document refer to the evidence
10 that was -- does it refer to Mr. Geisen?
11 A No.
12 Q So in that information that the NRC may
13 have received from the licensee, there may have been
14 other information that you and the agency may have
15 considered.
16 MR. HIBEY: Objection, Your Honor. He's
17 calling for speculation based upon this document, and
18 that is an unfair inference for him to premise the
19 question to this witness. The witness has been clear
20 about what he had before him and what his colleagues
21 had before him when they made the judgments they did
22 with respect to Mr. Geisen and others. This is an
23 improper question.
24 MR. GHASEMIAN: And, Your Honor, all we're
25 saying is that they had the information that was

1 beyond the four corners of the OI reports. That's --

2 MR. HIBEY: See, that's wrong. I mean,

3 that is just wrong.

4 JUDGE FARRAR: Well, you mean they had it.

5 No, you previous (pause) --

6 MR. GHASEMIAN: Your Honor, this document

7 simply says that they got additional documents and in

8 relation to these two individuals, they reconfirmed

9 the decision that they had made earlier not to take

10 action.

11 JUDGE FARRAR: Right.

12 MR. GHASEMIAN: But there's nothing in

13 here about Mr. Geisen --

14 JUDGE FARRAR: Right.

15 MR. GHASEMIAN: -- whether they had -- for

16 all we know, they may have gotten additional

17 information. I'm just arguing that.

18 MR. HIBEY: That's the point of my

19 objection.

20 MR. GHASEMIAN: It's not in evidence, nor

21 is it subject to your objection, but you know, I think

22 that's what you're implying maybe, but all I'm --

23 JUDGE FARRAR: Wait. Why do we need a

24 question? These documents came in in July 2006.

25 That's after the order was issued to Mr. Geisen.

1 So --

2 MR. GHASEMIAN: I believe Mr. --

3 JUDGE FARRAR: -- what do we care what

4 happened?

5 MR. GHASEMIAN: Okay. I misheard then.

6 I thought Mr. O'Brien said summer of 2005.

7 JUDGE FARRAR: No, you repeated that in

8 your opening question.

9 MR. GHASEMIAN: Okay. I just --

10 JUDGE FARRAR: And he corrected it.

11 MR. GHASEMIAN: All right. It's my

12 mistake. So let me try to clear the confusion. I

13 apologize to the Board.

14 BY MR. GHASEMIAN:

15 Q Prior to the -- between August of 2003, in

16 January of 2006, did the NRC receive additional

17 documents from any source?

18 A Not that I'm aware of.

19 MR. GHASEMIAN: Okay. Thank you.

20 JUDGE FARRAR: That's it?

21 MR. GHASEMIAN: That's it.

22 JUDGE FARRAR: Okay.

23 MR. HIBEY: That's it.

24 JUDGE FARRAR: Okay. Mr. O'Brien, I don't

25 know if you'll make your plane, but we thank you for

1 spending -- for coming in in a rather unorthodox
2 procedure and ask you to sit through and listen to Mr.
3 Geisen. Thank you for doing that and for sharing your
4 views with us, and the message you can take back even
5 if Mr. Ghasemian chooses to characterize us as yelling
6 at people, that none of that in our concern about this
7 case has anything to do with the need for the NRC
8 Staff to count on truthful information from people,
9 and we understand you view that as your job as an
10 important part of achieving that. So we thank you for
11 sharing your testimony with us.
12 Thank you.
13 THE WITNESS: Thank you, Your Honor.
14 MR. GHASEMIAN: Your Honor, for the
15 record, that was my maybe bad attempt at humor.
16 JUDGE FARRAR: That's all right.
17 MR. GHASEMIAN: That was just said in
18 jest, and I think you observed that I was smiling and
19 you were.
20 (Laughter.)
21 MR. GHASEMIAN: I think you got where I'm
22 coming from.
23 JUDGE FARRAR: Please don't talk about
24 Judge Hawkens. Don't talk -- don't mention this
25 anymore to him because if he had to choose between you

1 and me who was innocent and who was guilty, I know
2 where his vote is going.
3 Thank you, Mr. O'Brien.
4 (The witness was excused.)
5 JUDGE FARRAR: All right. Is Mr. Luehman
6 handy?
7 MR. GHASEMIAN: Yes, Your Honor. We just
8 have to call him to come down. We just didn't know
9 when.
10 JUDGE FARRAR: Go ahead and call him.
11 MR. GHASEMIAN: If we could have five
12 minutes.
13 JUDGE FARRAR: We'll take a little break,
14 but, Mr. Hibey, do you want to introduce these
15 exhibits?
16 MR. HIBEY: I was prepared to do that
17 after we heard from Mr. Luehman, but we can do it now.
18 I respectfully move --
19 JUDGE FARRAR: Oh, wait. No, Mr.
20 Ghasemian, you're going to argue about these.
21 MR. GHASEMIAN: Yes.
22 JUDGE FARRAR: Then let's get Mr. Luehman
23 down here. So let's come back -- it's three after.
24 Let's come back at 3:15.
25 MR. GHASEMIAN: Yes, Your Honor. Thank

1 you.

2 JUDGE FARRAR: Thank you.

3 (Whereupon, the foregoing matter went off

4 the record at 3:04 p.m. and went back on

5 the record at 3:17 p.m.)

6 JUDGE FARRAR: Okay. On the record.

7 Mr. Luehman, will you stand and raise your

8 right hand, please?

9 Whereupon,

10 JAMES LUEHMAN

11 was called as a witness by counsel for the NRC Staff

12 and, having been first duly sworn, was examined and

13 testified as follows:

14 JUDGE FARRAR: Thank you. And thank you

15 for coming today and for having been here earlier when

16 I know you have other work to do.

17 DIRECT EXAMINATION

18 BY MR. GHASEMIAN:

19 Q Good morning, Mr. Luehman, or good

20 afternoon. Time flies when you're having fun.

21 Could you state your name and spell it for

22 the record, please?

23 A My name is James Luehman, L-u-e-h-m-a-n.

24 Q And who do you work for?

25 A I work for the Nuclear Regulatory

1 Commission.

2 Q And how long have you been with the NRC?

3 A I've been with the NRC approximately 25

4 years.

5 Q And what is your current position?

6 A I am a Deputy Director, Deputy Division

7 Director in the Office of Federal, State, Material and

8 Environmental Programs.

9 Q And how long have you been in that

10 position?

11 A About eight months.

12 Q Could you tell us a little bit about your

13 educational background?

14 A I'm a graduate of the United States Naval

15 Academy. I was chosen by Admiral Rickover for the

16 U.S. Navy Nuclear Power Program. I qualified as a

17 nuclear engineering officer.

18 I came to the NRC. I was a resident

19 inspector, senior resident inspector before joining

20 the Office of Enforcement in Headquarters.

21 Q When did you join Office of Enforcement in

22 Headquarters?

23 A In 1987, and then I left in approximately

24 1993 to work in some -- in the Office of Nuclear

25 Reactor Regulation for a number of years, and I did a

1 fellowship on Capitol Hill.

2 I returned to the Office of Enforcement in

3 the year 2000 as the Deputy Director of the office,

4 and I was there until I took my present position.

5 Q Okay. Let me remind you. Please direct

6 your answers to the Board.

7 A Okay.

8 Q Or face them.

9 Did you do any research to prepare for

10 today's testimony?

11 A Yes, I did.

12 Q What did you do?

13 A When the Board made the request that they

14 would like some background on the regulations on the

15 deliberate misconduct rule and actions that the NRC

16 had taken under that, I worked with some of the

17 employees in the Office of Enforcement to go back and

18 review what I considered relevant cases. We extracted

19 some of the relevant cases from our databases, and

20 then I did some review of those, some of those cases.

21 Q And what was your criteria for the cases

22 that you reviewed?

23 A Well, specifically I looked for -- I

24 looked for cases that would be the most relevant to

25 this, which would be cases involving inaccurate or

1 incomplete information, cases that involve issues
2 roughly of the comparable safety significance or
3 roughly the same safety significance in their
4 particular area and also managers and individuals.
5 That would be roughly in the same positions as the
6 people we took the actions against in the Davis-Besse
7 proceeding.
8 Q That would include Mr. Geisen?
9 A Yes, it would.
10 Q Okay, and are you prepared to talk about
11 your -- the cases that you researched and --
12 A Yes, I am.
13 Q Were you involved in any of those cases?
14 A In the cases that I found that were
15 probably the closest match -- and I use that term
16 pretty loosely because I think that the facts vary
17 considerably from plant to plant and case to case, but
18 in the cases that I found the most relevant, a number
19 of those I would -- took place while I was not in the
20 Office of Enforcement, but some of the other cases,
21 yes, I wasn't involved in them.
22 Q So the cases that you were not involved
23 in, what is your source of information to talk about
24 them?
25 A We used our electronic databases. I

1 retrieved the cases. I read the actions that were
2 taken, which included the Staff's rationale for taking
3 those actions.
4 Q And are you talking about the actual order
5 that was issued against the individuals?
6 A Typically the order, their reply to the
7 order, the information that was readily available.
8 MR. GHASEMIAN: Your Honor.
9 JUDGE FARRAR: Do you want to ask about
10 the sequestration?
11 MR. GHASEMIAN: Yes.
12 BY MR. GHASEMIAN:
13 Q Did you watch any of the proceeding since
14 the end of Mr. Geisen's testimony?
15 A No, I have not.
16 Q Did you watch Mr. O'Brien testify?
17 A No, I did not.
18 Q Did anybody talk to you about Mr.
19 O'Brien's testimony?
20 A No, they did not.
21 JUDGE FARRAR: Good. Thank you.
22 Mr. Luehman, what year did you graduate
23 from the Naval Academy?
24 THE WITNESS: 1977.
25 JUDGE FARRAR: And you're not in the

1 Office of Enforcement now. Okay.

2 THE WITNESS: No, I am not.

3 JUDGE FARRAR: Let me elaborate on what I
4 said the other day about why we have you here. It's
5 our job, one of our jobs, to pass on the
6 appropriateness of the sanction imposed on Mr. Geisen,
7 and we don't get cases like this. So the
8 appropriateness of it compared to what?

9 So what we're asking you for is to help us
10 with how the agency has handled these cases in the
11 past, and under an old Appeal board decision we're not
12 bound by that, but that will be helpful to us in
13 putting Mr. Geisen's case in context. So the research
14 that you've taken the initiative to do should be
15 helpful to us in that regard.

16 Rather than us guess -- well, how
17 frequently, based on what you've learned -- and feel
18 free not to be absolutely precise here, but if you can
19 give us ball park, that's fine -- how many of these
20 five-year bans did you find have been imposed in the
21 last however many years you studied it?

22 THE WITNESS: Well, I would say that I
23 didn't count them all up. I didn't look at
24 necessarily all of them again. My criteria were to
25 look at the -- you know, the bans that I thought were

1 the closest to this, but I would -- to the
2 circumstances involved in this case based on, like I
3 said, inaccurate information, the levels of the
4 managers and individuals involved, as well as the type
5 of information or significance of the information that
6 was conveyed or not conveyed.
7 But I would say that just giving you a
8 ballpark in any year or so, I think that the agency
9 probably issues ten to 20 individual actions. Those
10 range from notices of violations to five-year bans,
11 and I would say that, you know, some subset, two or
12 three, three or four, maybe five-year bans. It
13 obviously would go -- it would go -- it wouldn't be
14 linear. It would go up and down based on the
15 particular cases. I mean, some of the cases are a lot
16 on the material side. A lot of the companies are very
17 small. So it would be one individual. Then you have
18 a case like this case in Davis-Besse where all in one
19 case you would have multiple individuals that received
20 bans.
21 JUDGE FARRAR: Why don't you just then
22 tell us the story that's in your mind now about the
23 cases you studied? You know, what should we learn
24 from the cases you've picked up?
25 Tell us about, you know, some of them that

1 you thought were comparable.

2 THE WITNESS: Well, I guess I could just

3 start off with, Your Honor, just a short. We've had

4 the deliberate misconduct rule, which is 50.5 under

5 the reactor regulations as companion regulations in

6 other parts of the CFR. That's been in place only

7 since 1989.

8 Prior to 1989, there wasn't in the

9 regulations -- we had the authority, but not -- there

10 were no regulations that allowed the NRC to take

11 individual actions against non-licensed persons.

12 And then in 1989, because of a number of

13 factors, we initiated a rulemaking in the Office of

14 Enforcement to create the deliberate misconduct rule,

15 and there were a number of factors that I could go

16 into if you want to that caused the rule to be

17 created. It was a proposed rule. There were comments

18 on the proposed rule, and ultimately a final rule was

19 issued with deliberate misconduct as the standard.

20 And then in the almost 20 years since

21 then, the Staff has endeavored to implement that rule.

22 There have been some -- there have been some changes

23 in the way we do it over time, and I think that, you

24 know, probably in the last ten or so years, I think

25 that the Staff has pretty consistently used an

1 approach of a process where if a violation is
2 deliberated, determined to be a deliberate violation
3 which is ultimately -- whether deliberateness can be
4 supported is a legal call, that then the Staff
5 considers whether they're going to take no action,
6 issue an NOV, which is a notice of violation which
7 would typically require response but wouldn't prohibit
8 the person from continuing to be in activities, or a
9 one, three or five-year ban from licensed activities.
10 And in reviewing the cases that I found,
11 I think that it's pretty clear that, you know, these
12 cases are very -- you know, have to be determined very
13 -- on an individual basis. We do have some criteria
14 that we consider. They're outlined in the enforcement
15 -- in the enforcement manual. There's discussion in
16 the regulation, the enforcement policy, and then in
17 the enforcement manual, and the Staff weighs those
18 different considerations and comes up with a -- and
19 comes up with a determination.
20 Obviously, one of the big determinations
21 we try to make or things we try to maintain is some
22 consistency between the previous actions and the
23 action that's under consideration.
24 In almost every case there's probably two
25 or three, depending upon how you count them, common

1 factors, and the other factors, if you will, in the
2 enforcement policy really may or may not apply in any
3 individual case. The factors that always apply are
4 the position of the individual that's involved in the
5 deliberate misconduct.
6 In other words, first you make the
7 determination that it was deliberate misconduct. Then
8 you go on and you consider the sanction.
9 In looking at that obviously the two
10 things that always apply are the position of the
11 individual and then the safety significance of the
12 information or the activity, both the actual safety
13 significance and the potential safety significance of
14 the information.
15 JUDGE FARRAR: Does it matter if someone
16 files false information, in your judgment? Does it
17 matter if a bad incident happens at the power plant as
18 a result of that false information or is it simply a
19 matter that you file false information; that's bad?
20 THE WITNESS: No, I -- well, I think
21 clearly it's bad, but I think clearly that's why in
22 the consideration, I mean, there's -- there's
23 consideration of both the potential significance of
24 the information and then the actuals. Did it actually
25 have significance?

1 JUDGE FARRAR: I struggle with the notion.
2 I understand the notion of potential --
3 THE WITNESS: Yes, sir.
4 JUDGE FARRAR: -- to file false
5 information. That has a certain potential. Whether
6 that potential is actuated or not would seem to me
7 almost irrelevant. You filed false information that
8 could have led to this. The fact that you were lucky
9 and it didn't happen doesn't make your action any less
10 dreadful.
11 THE WITNESS: Well, I agree. I agree with
12 you, but on the other hand, if something -- going in
13 that direction, I guess I agree with you, Your Honor,
14 but if you go in the other direction, if it has high
15 potential safety significance and then it actually
16 results that that event -- that it was supposed to,
17 that the NRC could have acted on or the utility could
18 have acted on if the individual provided the
19 information does, in fact, happen, I do think it makes
20 it more significant that it actually happened.
21 JUDGE FARRAR: Okay. Let me ask you. You
22 suppose you think someone has done something serious
23 enough that they get a five-year ban. So they go
24 serve their time, and they come back.
25 THE WITNESS: Yes, sir.

1 JUDGE FARRAR: How do you know they're
2 ready to come back? In other words -- well, let's
3 back up.
4 What's the purpose of the five-year ban or
5 what are the goals you're trying to achieve of any
6 ban?
7 THE WITNESS: Well, I think that the goals
8 of any ban are -- well, are the goals of the
9 enforcement, are the goals of the enforcement policy.
10 Our policy is not set out in and of itself to be a
11 punitive policy. The primary thing that we hope to
12 achieve through the bans is deterrence.
13 Now, obviously in trying to achieve
14 deterrence, you have to set some reasonable length,
15 some amount of penalty, if you will, to achieve
16 deterrence, and actually for the individual that
17 received the ban. There's no getting around it that
18 there's a punitive aspect to that because that's
19 being, you know, given. That person is being deprived
20 of the ability to perform certain work or perform in
21 the industry.
22 So, you know, at the individual level
23 there's no denying that there's a punitive element to
24 it, but --
25 JUDGE FARRAR: Is there also supposed to

1 be a rehabilitation element? Are you trying to
2 encourage this person to shape up so they can come
3 back to work?
4 THE WITNESS: Well, I think that, yes, I
5 think that clearly in most of the cases that we've had
6 where we've had individuals that have been banned for
7 a certain amount of time, there have been some
8 individuals that have come back in the nuclear
9 industry. I think that the overwhelming number of
10 those people that we've engaged after coming back in,
11 they said after everything that I've been through, you
12 know, that I'm the least likely candidate to do
13 anything in the future, and I think that we probably
14 agree with that.
15 JUDGE FARRAR: If two of the purposes are
16 deterrence and rehabilitation, doesn't the nature of
17 the individual's performance, reputation, integrity,
18 track record -- well, if you were all wise and all
19 knowing and said, "Okay. We have to punish this
20 person to achieve compliance around the industry, but
21 we don't want to be just punitive. We want to deter;
22 we want to rehabilitate," if you were trying to be
23 very wise, wouldn't you want to know something about
24 the person so that you would know what length of ban
25 might achieve that?

1 Not everybody is the same.

2 THE WITNESS: That's correct, but I think
3 that one of the -- I mean, I guess the philosophy and
4 the way that, you know, that we've set up or the way
5 we approach that is I think that we feel that any
6 amount of -- you know, that any amount of ban is going
7 to have -- that there's going to be -- you know, that
8 there's going to be some -- that there's going to be
9 a timeout in the industry, a time for reflection. I
10 think that our statistics, if you will, or our
11 recidivism rate if we had one -- we don't really --
12 but I don't think that we've had too many repeat
13 offenders as far as coming back and being subject to
14 deliberate misconduct anymore.

15 So I think that that has proven to be very
16 good. I think that you're right. You know, if we
17 were all knowing and all wise and we could, you know,
18 examine all the circumstances down to some fine point,
19 we could do that, but the fact is that there's other
20 considerations besides just the person's character.
21 There is their position. There's the safety
22 significance of the issues that have to be maintained.

23 So when we balance all of that, we think
24 we've come up with a fairly balanced system, which is
25 typically for, you know, first line supervisors

1 engaged in relatively what I would call less
2 significant deliberate conduct, we're talking at the
3 one -- on the one year and the highest and the highest
4 we're talking about is five years. I mean --
5 JUDGE FARRAR: Why is that the highest?
6 Why aren't there cases that would justify a lifetime
7 ban?
8 THE WITNESS: Well, we have. There are.
9 I think there are going to be. There are cases that
10 have justified a lifetime ban. In fact, we have one
11 I would say -- I don't know that it's -- it's not
12 strictly a lifetime ban, but there is one ban in place
13 where the person right now can't return to the
14 industry, and I can envision circumstances where we
15 might issue a longer ban.
16 For instance, if we had a person who was
17 involved in sabotage of the plant, they received a
18 jail sentence of ten years or 20 years. If they
19 wanted to return to the nuclear industry, I think we
20 would -- we would probably prohibit that.
21 So as a general matter those are the
22 guidelines we use. Now, some of those, you know,
23 anybody could come in and devise another system.
24 That's the system we've used. I think it has proven
25 an effective system. The length of the bans at the

1 upper end, one of the things that I think we're trying
2 to be sensitive about is we don't want to make it into
3 a lifetime ban. I mean, if we wanted to ban somebody
4 for life because we truly had loss of, you know,
5 assurance that they could do activities at any time in
6 the future, then we would do that and we're allowed to
7 do that under the regulation.
8 JUDGE FARRAR: I've been back here seven
9 and a half years. The only major ban cases I've ever
10 heard of are Davis-Besse. Are the reason those are
11 the only ones I've heard of is that was a major
12 incident at the power plant and, therefore, got a lot
13 of attention, and meanwhile you were all quietly
14 dealing with other cases where nothing ever happened
15 at the plant except false information was filed. It
16 didn't lead to any event. So you kind of quietly just
17 ban somebody and nobody hears about it?
18 In other words, you know, my impression if
19 you ask me how many bans have there been in the last
20 even years, I'd say the Davis-Besse people. Are there
21 -- tell me if --
22 THE WITNESS: And I would say, like I
23 said, I think that we issue anywhere from ten to 20
24 individual actions, many of which are bans of one,
25 three, five years across the nuclear industry every

1 year. I think that Davis-Besse clearly was one that
2 was of high press interest. All of the actions were
3 of high press interest.
4 I think that we have had other significant
5 actions that we have issued that have restricted
6 people from being in the nuclear industry, not just in
7 the nuclear power industry, but radiographers,
8 doctors.
9 JUDGE FARRAR: Yeah, I was thinking more
10 of the power plant kind of thing rather than the
11 radiographers.
12 THE WITNESS: Well, in the power plant
13 realm, Your Honor, many of the actions that have taken
14 place, many of the people that have been involved in
15 the power plant, because our lower level -- by and
16 large I would say that most of the problems that we
17 have, speaking today at the power plants are with
18 contract employees, typically lower level employees
19 that have issues. It's in the nuclear materials area
20 that we still have some licensee personnel and, in
21 fact, licensee officials where the industry -- you
22 know, that's the part of the industry that typically
23 has still more or less appreciation for our
24 regulations, I would say.
25 JUDGE FARRAR: All right. Let me ask you

1 this. Shifting from the sanction to the liability of
2 culpability, if there are serious charges against an
3 individual, do you think it's important that the
4 people who make the decision to proceed against that
5 individual would have given that individual a chance
6 to tell his story to them before they decide to go
7 against him?
8 THE WITNESS: As a general rule, that's
9 what we -- that's what we strive to do.
10 JUDGE FARRAR: And how would you
11 accomplish that? In other words, if you were sitting
12 on an enforcement panel and say, okay, and somebody
13 hands you a file. Would one of your questions be,
14 "Well, what does the fellow say?"
15 THE WITNESS: Well, we clearly -- we
16 clearly have -- there's a couple steps in that
17 process. One is that that individual has been
18 interviewed probably by the Office of Investigations
19 about the issue.
20 JUDGE FARRAR: Suppose none of the people
21 who interviewed him are sitting around the table for
22 you to check with and all you have in front of them is
23 a report which they prepared, which may be of good
24 quality, may be of uneven quality. It may be done by
25 people as senior as yourself, or it may be done by

1 people who are junior.

2 How do you evaluate if those people aren't

3 there? How do you evaluate that information and how

4 do you know if you've heard the story of the accused

5 so as to weigh that in the balance before you issue,

6 for example, a five-year ban?

7 THE WITNESS: Well, I think that after we

8 make the determination, again, after actually it's

9 really the staff assisting the Office of General

10 Counsel in making the determination that we have an

11 action, a potential deliberate action such that we

12 would proceed to the next step, the normal process

13 then is to offer the individual -- well, in many cases

14 to offer the individual an enforcement conference or

15 to respond in writing to the potential -- to the

16 potential action before the action is issued.

17 JUDGE FARRAR: that doesn't cost you a lot

18 of time or effort, does it?

19 THE WITNESS: It depends upon the case,

20 Your Honor. Sometimes it can.

21 JUDGE FARRAR: But if you were sitting on

22 that panel after the person came in, you would feel

23 you were better informed than you had been.

24 THE WITNESS: I think that there is -- in

25 most cases I think that that would be the case, yes,

1 sir.

2 JUDGE FARRAR: Questions?

3 JUDGE HAWKENS: The enforcement order
4 issued in the Geisen case indicates that the Director,
5 Office of Enforcement, may relax or rescind any of the
6 above conditions upon demonstration by Mr. Geisen of
7 good cause, and I'm wondering if you can give me some
8 examples of good cause.

9 THE WITNESS: Well, I think that, you
10 know, the answer to that is, Your Honor, that we've
11 had numerous people with their enforcement actions
12 make appeals to the Director of the Office of
13 Enforcement either saying that after a certain period
14 of time that they feel that, you know, the rest of
15 their time should be, you know, waived or relaxed.
16 They many times will offer actions that they've taken
17 or will agree to take to have that happen.

18 Sometimes they -- when we issue a ban to
19 an individual from all NRC regulated activities, after
20 a certain amount of time an individual may come in and
21 say, "I can understand why the NRC doesn't want me in
22 a management position, but I'm making a proposal that
23 I come back as an engineer who will be supervised, and
24 therefore, I request that, you know, now that I've
25 served three of the five years that for the remaining

1 two years that I get some kind of -- you know, I agree
2 to only be in a supervise position," and we consider
3 those requests as they're made.
4 In fact, now, even prior to getting to an
5 action, with most individuals our normal process is
6 that we offer them alternative dispute resolution
7 where these types of considerations and offers are
8 made.
9 I would just add that in the one group of
10 cases where we don't offer alternative dispute
11 resolutions are cases where there is an ongoing or
12 potential for a criminal prosecution. The NRC as a
13 matter of policy doesn't see offering those kinds of
14 negotiations while we're in the middle of a criminal
15 -- while the Department of Justice is in the middle of
16 a criminal case. That's just not going to happen
17 because it's the perception and also the legal
18 complications of it.
19 JUDGE FARRAR: Let me ask you a question
20 about immediate effectiveness.
21 THE WITNESS: Yes, sir.
22 JUDGE FARRAR: Sometimes orders are issued
23 and they're made immediately effective and sometimes
24 they aren't. I'm sure it's not done randomly. What
25 goes into that kind of determination?

1 THE WITNESS: I think that there's --
2 well, there's two things, Your Honor. One is that the
3 way the process works from the beginning is there's a
4 number of steps in the process. At some point there's
5 an allegation that an individual or individuals have
6 done something wrong. At that point the agency weighs
7 whether given the significance, if that would prove
8 true, that we need to act at that point.
9 If the answer is, no, we have to
10 investigate it more, we can't make the burden or we
11 don't know how likely it is, that will be -- and
12 that's made at an Allegation Review Board -- then the
13 allegation if it's deliberate misconduct or any kind
14 of wrongdoing, is turned over to the Office of
15 Investigation.
16 The Office of Investigation then starts an
17 investigation. At any point in that investigation
18 where they feel that they've uncovered significant
19 safety information and/or they reach the point where
20 they are ready to make a call that there was
21 deliberate misconduct, they bring that back to the
22 staff, and the staff then again makes a consideration
23 of whether action is required at that point.
24 If the staff then makes the determination
25 at that point that action is not warranted, then OI

1 would proceed on to complete their investigation, and
2 then we will take action at the point of OI completing
3 its investigation.
4 Now, with respect to the immediate
5 effectiveness of the order, obviously sometimes that's
6 needed to write a safety condition or a potential
7 safety condition, and the agency is not at the point
8 where they can agree to, you know, having it litigated
9 before the action is taken.
10 In other cases, we make the determination
11 that a hearing on this matter can proceed before the
12 action is taken.
13 JUDGE FARRAR: Could you in that
14 circumstance go to that employer and say, "We're going
15 to issue this order against your employee. It will be
16 litigated. It's not immediately effective, but we
17 want you to take certain measures to be sure that
18 anything that employee is involved in sending to the
19 NRC is double and triple checked before it comes in?
20 Would that be a permissible kind of condition you
21 could --
22 THE WITNESS: I would have to defer to the
23 Office of General Counsel on that, Your Honor, because
24 one of the considerations in the creation of the
25 wrongdoer role was that the Office of General Counsel

1 was very concerned about the NRC, you know, engaging
2 in activities with employers that might restrict
3 employees without the employee having any kind of due
4 process.
5 So you know, I'm not saying that as a
6 general matter the NRC couldn't go to an employer that
7 had a potential issue at the plant and say, "We want
8 you to double and triple check everything you send
9 us," but I think that if we get to the point where
10 we're focusing in on one employee without any kind of
11 legal restrictions on them, then I think that my
12 counsel in the Office of General Counsel telling me
13 that I'm going to be if not close to the line over the
14 line.
15 JUDGE FARRAR: Okay. So under your view
16 it could deprive the employee of due process to put
17 these conditions on his labors in lieu of an
18 immediately effective order. Would that be worse than
19 without hearing from him at all, issuing an
20 immediately effective order that bans him the next
21 day?
22 THE WITNESS: You know, Your Honor, I
23 wouldn't speculate on that. I'm just -- I'm just
24 telling you what I think that we've been advised our
25 legal restrictions would be.

1 JUDGE FARRAR: Oh, no, I fully appreciated
2 the first answer. I want to take you from that first
3 answer into is the same due process you mentioned
4 about going to the employer and saying, "Keep an eye
5 on Joe over there," without Joe having a real say in
6 it. How about when we go to Joe and say, "You're out,
7 friend. You'll get a hearing some day"?
8 THE WITNESS: The answer is that the
9 individual in that case is allowed under the
10 regulations to challenge the immediate effectiveness
11 of the order.
12 JUDGE FARRAR: On very, very, very, very
13 limited grounds?
14 THE WITNESS: I don't -- I'm not a lawyer.
15 I don't know what the criteria you have to make to
16 successfully challenge an immediate effectiveness. I
17 just know that the time frame within which the Office
18 of General Counsel and the Staff have to respond to
19 such a request is pretty tight because, again, if
20 we're going to use immediate effectiveness, I think
21 that the regulations recognize that we're immediately
22 removing somebody from their position, and you know,
23 a panel such as this is going to hear those arguments
24 before we take that action.
25 JUDGE FARRAR: Let me ask you this.

1 Suppose an investigation was completed and all the
2 evidence was gathered about a person, and two and a
3 half years later the person, without being heard from,
4 was banned from the industry effective immediately.
5 How would you explain to the public if that person was
6 an immediate threat to the community on Day X that he
7 had not been an immediate threat to the community in
8 the previous two and a half years?
9 THE WITNESS: Well, the way I would answer
10 that, Your Honor, is I would say that going back to
11 the process that I laid out, back when --
12 JUDGE FARRAR: Before you go to the
13 process --
14 THE WITNESS: Yeah.
15 JUDGE FARRAR: -- answer it in the same --
16 wearing the same hat you wrote a minute ago when you
17 told me about your concern about due process with the
18 employee, with NRC working with the employer and the
19 employee not getting to be heard. Leave out the
20 process for a minute because one of the reasons we
21 asked you here is we wanted an old wise head here.
22 THE WITNESS: Okay.
23 JUDGE FARRAR: I don't know if you take
24 that as a compliment or as an insult, but you've been
25 around this for a long time.

1 THE WITNESS: Yes, sir.

2 JUDGE FARRAR: How can a person be allowed
3 to work for two and a half years when the Staff knows
4 what they know about him, and then while the wheels
5 grind slowly and the Department of Justice does
6 something and all of a sudden one day, ah-ha, the
7 fellow is an immediate threat and has to be banned?
8 Nothing has changed.

9 Tell me how that can be rationalized given
10 your layman's notions of due process.

11 THE WITNESS: Well, I think that I'd have
12 to -- I'd have to correct an assumption that you make
13 in that statement, and that assumption is that when
14 the OI investigation has been completed that the staff
15 has, therefore, reached a conclusion that this person
16 has done something that meets the criteria for --

17 JUDGE FARRAR: Okay. I'll give you a
18 month. I'll give you six months. I'll give you a
19 year to make that decision. The case I'm talking
20 about, you may not think this is a real case. One
21 case took two and a half years.

22 THE WITNESS: No, I understand that, and
23 I think that my answer to that is that the
24 investigations, the investigation is completed. We
25 make the first determination that we make. You were

1 asking me about how we explain it to the public. What
2 we do is that we tell the public or what our process
3 is, that once OI reaches that agreement, we look at
4 where -- we look at all of the individuals, the
5 individual or all of the individuals that were
6 potentially involved. We try to understand what their
7 position is, and based on where they are and the work
8 that they're doing at that time, can we proceed at a
9 deliberate pace to reach the correct conclusion by
10 reviewing all of the evidence with them in place where
11 they are?
12 If we can't do that, then we'll act
13 immediately. If we can leave -- if we can leave them
14 in place because we feel they have sufficient
15 supervision, they have job responsibilities that may
16 have changed since the activities that they're accused
17 of being involved in; that then we'll do our review in
18 a manner that's consistent with getting to the right
19 answer, what we view the right and correct answer in
20 these cases, and then we'll act.
21 JUDGE FARRAR: If they were in a new
22 position --
23 THE WITNESS: Even if they were in --
24 JUDGE FARRAR: No, no, no, no. If they
25 were in a new one, would you want to know what they

1 were doing in the new position and what their role was
2 there and what the people there thought of them and
3 whether they could supervise them in the interim?
4 Would those be relevant factors for you?
5 THE WITNESS: Again, I think that
6 obviously if we could collect all that information,
7 that would be one thing, but I think that there's a
8 fine line there, Your Honor, because we do do some
9 determination of what their job is at that time, what
10 their activities are. We would not, in order to
11 understand what their relation to the safety of the
12 activity that they're doing, but we're not going to
13 inquire of employees at the plant.
14 You know, the problem is this person
15 hasn't been found guilty of anything.
16 JUDGE FARRAR: Yeah, but you're going to
17 protect them from an invasion of their privacy by
18 throwing them out of their job.
19 THE WITNESS: That, within the legal
20 limits of the process, I guess that's -- that may be
21 a byproduct of it.
22 JUDGE FARRAR: Okay.
23 JUDGE TRIKOUROS: When submittals are made
24 to the NRC from a licensee where the information has
25 a certain critical nature for safety issues, it's

1 often submitted under oath where a vice president or
2 an executive of the company signs that, you know,
3 under oath they swear that to the best of their belief
4 information and knowledge that the information is
5 correct.
6 And prior to that, within the company
7 there were various sign-offs from subordinates of that
8 person regarding the technical nature, the technical
9 adequacy of the submittal and that sort of thing.
10 THE WITNESS: Yes, sir.
11 JUDGE TRIKOUROS: The submittal then goes
12 to the NRC. The NRC reviews it and finds that it
13 contains inaccurate or incorrect information, and
14 let's assume hypothetically that they find some of the
15 people who sign the technical reviews, subordinates of
16 the executive level, guilty of that.
17 THE WITNESS: Yes, sir.
18 JUDGE TRIKOUROS: What does the NRC Office
19 of Enforcement view or to what standard does the
20 Office of Enforcement place that signature under oath
21 made by the executive? Is that just a signature as if
22 it were not under oath? Does the under oath aspect of
23 that change anything? Does the under oath aspect of
24 that result in if there's punitive action it would be
25 to the company but not to the individual signing it?

1 How does that work?

2 THE WITNESS: I think in reality, I think

3 that, again, I'm not a lawyer, but I talk to a lot of

4 lawyers. I think the answer is that in reality

5 whether a document is submitted under our

6 jurisdiction, is submitted under oath by the company

7 or not under oath by the company, it may add some --

8 it may add some, you know, emphasis, but legally

9 speaking I think that the documents carry the same

10 weight; that if Vice President X signs it and say it's

11 so, whether he does so under oath or affirmation, he's

12 still providing it to the Government as an agent of

13 the company, and the potential actions we could take

14 against the company in either case are the same.

15 JUDGE FARRAR: Again, company.

16 THE WITNESS: Yes.

17 JUDGE FARRAR: What about against him? In

18 other words, does he have a higher duty to inquire of

19 his subordinates than somebody who doesn't submit it

20 under oath? Because if he doesn't have a higher duty

21 to inquire, you're right. Why submit it under oath?

22 I assume that was supposed to send him

23 some message.

24 THE WITNESS: I would, yes, sir. I think

25 that that's the answer, but again, the standard for

1 him as an individual is deliberate misconduct, and he
2 has to have done, deliberately done, taken some action
3 or not taken some action that was required of the NRC,
4 and in those cases, we would look at what somebody at
5 any position, what their relevant role should have
6 been, what was reasonable for somebody in that
7 position, the level to which they should have inquired
8 or the level to which they should have checked things,
9 and that varies from, you know, company to company,
10 how they do their procedures.
11 It also varies across -- you know, up and
12 down the chain of command, and quite frankly, that's
13 an area where I think that, you know, the NRC, we're
14 all -- in the enforcement world, we're always viewed
15 as, well you always go after the little guy and you
16 never go after the big guy.
17 Well, the problem is if the standard is
18 deliberate misconduct, the guy that's down there
19 actually turning the wrench or whatever the activity
20 is, if he doesn't do that and signs a procedure that
21 say she doesn't do that, it's pretty easy to prove
22 that he did something deliberately. The higher up you
23 get in any organization, the harder it is to prove
24 that somebody had knowledge and didn't properly
25 operate or execute what they should have done based on

1 that knowledge. Because they are insulated, and
2 again, vice presidents or presidents of companies
3 aren't going to go back and redo the calculations or
4 at some point there's a degree of reasonableness of
5 what the checks that they do on the information that
6 are provided under their name.
7 JUDGE TRIKOUROS: So the idea that this
8 implementation of the submittal under oath, which I
9 understood was to get more accurate information, more
10 correct information and minimize the likelihood of
11 inaccuracies and that sort, is really meaningless for
12 the most part.
13 THE WITNESS: I'll defer to the Office of
14 General Counsel to give you that answer.
15 JUDGE FARRAR: Well, no, we hear plenty
16 from them, but if you don't want to, that's fine.
17 You said it's really hard to pin it on the
18 top people, and they don't have to check all the
19 calculations. Let's take a middle level person who's
20 given information by people he trusts. You wouldn't
21 hold him to a higher standard than the vice president,
22 would you?
23 THE WITNESS: I think what we attempt to
24 do is we attempt to understand each person's -- each
25 person's responsibility into the organization and the

1 interactions that they had and what they knew and when
2 they knew it and make the determination based on the
3 best picture we can assemble of how the information
4 flowed, what people's relative responsibilities were,
5 and make the determination from that.
6 JUDGE FARRAR: Were you involved in the
7 Davis-Besse case?
8 THE WITNESS: Yes, I was.
9 JUDGE FARRAR: You were here for Mr.
10 Geisen's testimony?
11 THE WITNESS: Most of it.
12 JUDGE FARRAR: Did anything you hear put
13 a different light on things from what you remember you
14 knew at the time the enforcement order was issued
15 against Mr. Geisen?
16 THE WITNESS: That's a pretty broad
17 question. I didn't -- I'd have to say, Your Honor,
18 that I think that there's some things that I heard
19 that I didn't -- you know, that I had not heard
20 before, but I can't say. You know, I listened to the
21 testimony, but I haven't done a specific review of the
22 Davis-Besse documents in preparation for this
23 testimony. So my knowledge of all the activities that
24 we as a staff deliberated on versus the things that
25 Mr. Geisen testified on I can't say that I'm, you

1 know, fully up to speed on all of those.

2 JUDGE FARRAR: You see a lot of documents

3 in your work.

4 THE WITNESS: Yes, sir.

5 JUDGE FARRAR: Six months after you had

6 signed off on a document somebody else wrote would you

7 think it fair of me if I -- and then you wrote some

8 other document and I pointed six months later or

9 pointed to a document you had signed off on six months

10 earlier, a three or four-page document, and there was

11 a line in there that was inconsistent with the later

12 memo you wrote. Would you think it fair for us to say

13 you lied because you had signed off on this earlier

14 document and, therefore, you must have had it in your

15 mind when you wrote another document three months

16 later?

17 THE WITNESS: I think it would depend upon

18 the importance of the document, and it depends upon

19 the specifics of the information whether I would think

20 it was fair that you held me accountable for that.

21 JUDGE FARRAR: All right. Thank you.

22 That concludes our questioning. Mr. Ghasemian?

23 MR. GHASEMIAN: I only have one question.

24 FURTHER DIRECT EXAMINATION

25 BY MR. GHASEMIAN:

1 Q You said that you were here for most of
2 Mr. Geisen's testimony.
3 A Yes, I was.
4 Q Did anything that you heard new question
5 the appropriateness of the order that the agency
6 issued against Mr. Geisen?
7 A Excuse me? Can you rephrase?
8 Q Did you say you heard some new information
9 that you hadn't -- you didn't know before or you
10 hadn't heard before?
11 A Well, no. I mean, I heard an explanation
12 of the information. I heard Mr. Geisen's explanation
13 of the facts and the documents that we considered, and
14 I had not heard that to that level before.
15 Q Okay. Did his explanations question the
16 appropriateness of the order that we issued against
17 Mr. Geisen.
18 A In my view or in his view?
19 Q In your view. Did his explanation of the
20 various --
21 MR. HIBEY: Isn't this beyond?
22 JUDGE FARRAR: No, it's okay. I know it's
23 beyond what I did, but he's not had a chance to
24 examine. That's fine.
25 BY MR. GHASEMIAN:

1 Q You just testified earlier I think to the
2 Board's questions that you heard some new information
3 that you hadn't heard before, and I understand that to
4 be Mr. Geisen's explanation of the various events or
5 documents and so forth.
6 A Yes.
7 Q Okay. Did that change or did that make
8 you question the appropriateness of the order that the
9 NRC issued against Mr. Geisen in January of 2006?
10 A With the caveat that I didn't listen to
11 all of Mr. Geisen's testimony, I would say that I
12 didn't hear an argument that would change my mind on
13 the view that we took.
14 MR. GHASEMIAN: No more questions.
15 JUDGE FARRAR: Mr. Hibey?
16 MR. HIBEY: No questions.
17 JUDGE FARRAR: Ms. Clark, could you in one
18 of your submissions give us a -- give us -- you're
19 picking up your pencil. You know where that one's
20 going, right? -- give us a list of all the five-year
21 bans since the 1989 rulemaking that affect people
22 working at nuclear power plants, not the materials
23 case? You know, make some kind of table with some
24 kind of relevant, you know, relevant information,
25 whatever columns you think need to be filled out.

1 JUDGE HAWKENS: Although I would also
2 request that if you find some materials cases that may
3 be relevant, you could feel free to include them as
4 well.
5 JUDGE FARRAR: Good. Mr. Luehman, thank
6 you very much for coming. We know this was not in
7 your regular duties, and sitting watching our
8 proceedings probably kept you from some other
9 important work, and we appreciate you coming down here
10 and giving us your candidate appreciation and
11 understanding of the system.
12 Thank you.
13 THE WITNESS: Thank you, sir.
14 JUDGE FARRAR: You're excused.
15 THE WITNESS: Thank you very much.
16 (The witness was excused.)
17 JUDGE FARRAR: It's now ten after four.
18 We had talked about closing arguments. We had had in
19 our last recess, I mean, I think we were talking ten
20 minutes or so each or does somebody have longer in
21 mind?
22 MR. WISE: I think we may need a little
23 bit longer.
24 JUDGE FARRAR: How long would you like.
25 MR. WISE: I think we could probably do it

1 in 20.

2 JUDGE FARRAR: Okay. Ms. Clark?

3 MS. CLARK: Twenty should be plenty of

4 time.

5 JUDGE FARRAR: Okay, and then why don't we

6 talk so that we can kind of end of a high note. Let's

7 talk briefs now.

8 MR. HIBEY: We have to talk exhibits. We

9 move our exhibits.

10 MS. CLARK: Oh, yes.

11 JUDGE FARRAR: Oh, yes.

12 MS. CLARK: We have an exhibit, right?

13 JUDGE FARRAR: Okay. Staff has an

14 exhibit?

15 MR. GHASEMIAN: It's the Geisen work

16 strategy form that we had requested.

17 JUDGE FARRAR: Okay. What exhibit number

18 is that?

19 MS. CLARK: Number 85.

20 JUDGE FARRAR: Okay. Staff Exhibit 85,

21 thank you, which we have -- that will be identified

22 and accepted into evidence, admitted into evidence.

23 (Whereupon, the document referred to was

24 marked as Staff Exhibit No. 85 for iden-

25 tification and received in evidence.)

1 JUDGE FARRAR: Now, Mr. Geisen's exhibits?
2 MR. HIBEY: Your Honor, we respectfully
3 move the exhibits.
4 JUDGE FARRAR: Okay. Which ones are
5 those?
6 MR. HIBEY: You're pressing me here, Your
7 Honor. Twenty-two through --
8 JUDGE FARRAR: Twenty-two.
9 MR. HIBEY: I figure it's 22 through 28
10 with the exception of one that was not marked, 26.
11 Twenty-two through 28, and we purposely left blank 26.
12 JUDGE FARRAR: Okay. Twenty-two, 23, 24,
13 25, 27, and that was 28. Okay. What's 22? I don't
14 seem to have that. Oh, I have it. Here it is. Okay.
15 Exhibit 22, the internal memo, alerting the
16 Commissioners. Any objection to that, Ghasemian?
17 MR. GHASEMIAN: No, Your Honor.
18 JUDGE FARRAR: Okay. Geisen 22 will be
19 accepted.
20 (Whereupon, the document previously
21 marked as Geisen Exhibit No. 22 for
22 identification was received in evidence.)
23 JUDGE FARRAR: Geisen 23 is the excerpts
24 form the OI report.
25 MR. GHASEMIAN: We object, Your Honor.

1 There's no relevance; there's no basis. It's
2 excerpts. There's various issues with this document.
3 JUDGE FARRAR: Well, tell me.
4 MR. GHASEMIAN: It has nothing to do with,
5 you know, Mr. Geisen's sanctions or the underlying
6 violation. It's just the index of the OI report.
7 JUDGE FARRAR: It goes to OI thinking that
8 Mr. Martin provided. Didn't provide any material
9 information?
10 MR. GHASEMIAN: Well, Your Honor, see,
11 that's only page 211. We don't have the previous
12 pages, but that sentence and that characterization
13 only refers to the information that's referred to in
14 this section, as we understand it, the way OI kind of
15 organizes their reports.
16 And maybe Ms. Clark may be able to explain
17 it better because she --
18 JUDGE FARRAR: Well, how about let's save
19 some time. If that's true, why don't we admit it? We
20 will check the original OI report. If that's true,
21 then we'll admit it for what it's worth, and that
22 would mean it wasn't worth too much if it's only that
23 section.
24 MR. GHASEMIAN: Well, what I'm passing on
25 to you is kind of like double hearsay. I think Ms.

1 Clark talked to the OI field office.

2 MS. CLARK: Well, I can talk.

3 MR. GHASEMIAN: Okay.

4 MS. CLARK: I just am concerned that we
5 don't leave a misimpression by these exhibits, and I
6 just want to clarify. I haven't had a chance to see
7 the whole OI report, but it appears that the document
8 that we're referring to, when it says, "The following
9 people were interviewed by OI during the course of
10 this investigation," and they list Mr. Martin; OI
11 interviewed Mr. Martin at a later time than those
12 interview notes that we saw.

13 So there's two separate documents
14 concerning Mr. Martin. One is the notes of the
15 interview that he did of Mr. Geisen, and the second
16 document is this document, which is OI's later
17 interview of him. Now, those notes that I was talking
18 about are also an exhibit to the OI report, and that
19 is not a matter that's listed as something that did
20 not provide any material information.

21 So, in fact, if you look at everything as
22 a whole, the OI found that information was material,
23 but what they found material was Mr. Martin's actual
24 notes, not their interview of him.

25 JUDGE FARRAR: All right, but it was being

1 offered --

2 MR. WISE: We agree with that.

3 JUDGE FARRAR: Okay. So agree and you

4 don't want it introduced?

5 MR. WISE: No, we do want it introduced.

6 That's why it's relevant.

7 MS. CLARK: But then I would ask that the

8 entire report be introduced and not just these

9 excerpts because I think they're misleading without

10 the rest of that information

11 JUDGE FARRAR: Well, I think that's more

12 a point of argument. The point Mr. Geisen was making

13 was that nobody learned -- nobody doing the

14 investigation followed up on this matter, and that's

15 a matter for argument.

16 MS. CLARK: Oh, that's not demonstrated by

17 the OI report. That was with regard to Mr. Miller's

18 notes. That's a different exhibit.

19 JUDGE FARRAR: No, no, I'm talking about

20 Mr. Martin.

21 MS. CLARK: No, I believe that --

22 JUDGE FARRAR: Given Mr. Martin's notes,

23 nobody said to Mr. Geisen, "Is this what you said to

24 Mr. Martin?"

25 MS. CLARK: But that's shown by Mr.

1 Geisen's interview. That's not shown by this list of
2 documents.
3 MR. WISE: Nor did they ask Mr. Martin to
4 explain what happened in the interview.
5 MS. CLARK: And that would be shown by Mr.
6 Martin's interview. This list has nothing to do with
7 any of those matters.
8 MR. WISE: Your Honor, it will be clear in
9 argument what relevance --
10 JUDGE FARRAR: We'll let it in. We'll let
11 it in for what it's worth. That can be a subject of
12 argument.
13 JUDGE HAWKENS: And I think we understand
14 your concerns.
15 MS. CLARK: Okay.
16 (Whereupon, the document previously
17 marked as Geisen Exhibit No. 23 for
18 identification was received in evidence.)
19 JUDGE FARRAR: Twenty-four, the interview
20 of Mr. Martin.
21 MR. GHASEMIAN: Well, along the same
22 lines, it's hearsay and the relevance to actions, it's
23 statements --
24 JUDGE FARRAR: Wait. It's not hearsay.
25 MR. GHASEMIAN: Well, it's being

1 introduced through Mr. O'Brien, and Mr. Hibey is
2 asking Mr. O'Brien about what an OI investigator asked
3 of Mr. Martin. I mean --
4 JUDGE FARRAR: He was trying to show that
5 the OI investigator didn't pursue this with Mr. Martin
6 the way he should have. Is that what you're trying to
7 show?
8 MR. GHASEMIAN: I mean, that goes to
9 relevance. I mean, whether OI did a good job or not,
10 I thought the focus is on Mr. Geisen rather than on
11 OI.
12 JUDGE FARRAR: Yeah, but if the people
13 sitting around Mr. O'Brien's table had bad
14 information, then that is a question for us on whether
15 the finding of culpability and the sanction were
16 correct.
17 MR. GHASEMIAN: And I would contend that
18 that can be determined based on Mr. O'Brien's
19 testimony, Mr. Martin's testimony who appeared before
20 you, and the document itself.
21 JUDGE FARRAR: Yes, but here's what Mr.
22 Martin said before. You know, we're not bound by the
23 hearsay rule. There's hearsay that's totally
24 unreliable and there's hearsay that's highly
25 probative. I mean, no one is challenging the accuracy

1 of this transcript.

2 PARTICIPANT: So we can admit it?

3 JUDGE FARRAR: Yeah. We understand your

4 objection. We'll admit that for what it's worth.

5 MR. GHASEMIAN: Thank you, Your Honor.

6 (Whereupon, the document previously

7 marked as Geisen Exhibit No. 24 for

8 identification was received in evidence.)

9 JUDGE FARRAR: Twenty-five, the little

10 excerpt from the interview of Mr. Geisen.

11 MR. GHASEMIAN: That's already in the

12 record, Your Honor. It's the whole -- as far as maybe

13 I stand to be corrected if I -- the whole -- Mr.

14 Geisen's entire transcript is already --

15 MR. HIBEY: Oh, I'm sorry. Had I known

16 that, I would have gone to that exhibit.

17 JUDGE FARRAR: All right.

18 MR. HIBEY: But I didn't.

19 JUDGE FARRAR: So at worst it's

20 duplicative.

21 MR. GHASEMIAN: Exactly.

22 JUDGE FARRAR: Okay. Then we'll admit it

23 because this is the document Mr. Hibey questioned on

24 and it won't make any sense to someone reading the

25 transcript if we don't have this document even though

1 it is duplicated.

2 (Whereupon, the document previously

3 marked as Geisen Exhibit No. 25 for

4 identification was received in evidence.)

5 JUDGE FARRAR: There is no Geisen 26.

6 Geisen 27 is the Inspector General's report.

7 MR. GHASEMIAN: Yes, Your Honor. I guess

8 I would question the relevance of it. I mean --

9 JUDGE FARRAR: You can argue the

10 relevance.

11 MR. GHASEMIAN: Well, it refers to OIG's

12 findings relating to what the resident inspectors

13 received or, you know, I guess they concluded that the

14 inspectors received the red photos or the condition

15 reports, but there is no basis. There is no

16 indication of what they relied on to reach that

17 conclusion.

18 I'm not saying it's incorrect, but --

19 JUDGE FARRAR: Isn't -- doesn't the world

20 kind of believe that Inspector General reports in any

21 agency have a certain automatic indicia of

22 authoritativeness?

23 MR. GHASEMIAN: Yes, Your Honor, but the

24 only reason I bring it up is that Mr. Simpkins

25 actually testified in Mr. Siemaszko's criminal trial,

1 and during that trial, I think actually he was
2 defense's witness, and he testified several times that
3 to the best of his recollection he had never -- he
4 didn't receive the red photo. So that's what I just
5 bring to your attention, that you know, I'm not
6 questioning what OIG, what facts they reached, they
7 based their conclusion on, but all I'm passing on to
8 you is that Mr. Simpkins testified that he doesn't
9 recall ever seeing the red photo during the period in
10 question.
11 JUDGE FARRAR: Mr. Hibey, why do you want
12 the Inspector General report in front of us?
13 MR. HIBEY: Well, the Inspector General
14 report, I say, reflects on the statements made
15 supporting the action that was taken by the
16 enforcement people. The enforcement people said, for
17 example, that the lessons learned test for
18 establishing conduct, no failures on the part of their
19 people. In truth and in fact, there was evidence that
20 the red photo which, according to Dr. Hiser would set
21 off alarms with any reasonable engineer who saw it,
22 that, indeed, there was a huge problem regarding the
23 head at the plant.
24 This all goes to the integrity of the
25 investigation that the OI conducted and upon which

1 people like Mr. O'Brien and his enforcement colleagues
2 rely entirely to reach the conclusions that they did
3 about in our case Mr. Geisen.
4 So where the policy speaks to the question
5 of what constitutes knowing and deliberate misconduct,
6 it seems to me that we have impeached the integrity of
7 the fact finding that was going on relative to who did
8 what, who knew what and when, and what could have been
9 done about it. And it is, I think, a very significant
10 fact that -- this is the word I'll use -- impeaches
11 the fact finding that underlies the structure for
12 taking any kind of enforcement action against Mr.
13 Geisen.
14 And it also reflects the state of mind of
15 the people who are deciding these questions about Mr.
16 Geisen. I think it's a very important set of findings
17 by an independent constituency within the overall
18 organization.
19 JUDGE FARRAR: Suppose with all of this
20 evidence we were able to reach a conclusion that Mr.
21 O'Brien's people made a bad decision when they decided
22 to go ahead based on what they were looking at.
23 MR. HIBEY: Then you don't get to the
24 second question.
25 JUDGE FARRAR: Oh, no. Can Ms. Clark

1 still defend the enforcement order even though it
2 shouldn't -- there was a bad process that led to it,
3 but it's still valid.
4 MR. HIBEY: At her peril. I mean --
5 JUDGE HAWKENS: I suspect that will be
6 briefed.
7 MS. CLARK: Well, I would like to respond
8 now actually.
9 MR. HIBEY: You know, I make that
10 statement. I think you understand what I mean.
11 JUDGE FARRAR: No, I know what you mean,
12 but that triggered this question. Is the case over if
13 we decide Mr. O'Brien presided over a process that was
14 not adequate, not fair or not whatever, and they
15 really had no basis to go ahead. If we reach that
16 conclusion is the case over or does Ms. Clark say
17 we're still going to prove this guy guilty?
18 JUDGE HAWKENS: I think that's an issue
19 that we can --
20 JUDGE FARRAR: Yeah, that's too much to do
21 here, but --
22 MS. CLARK: Well, if I can just respond,
23 I'm not sure that this even needs briefing, frankly.
24 JUDGE FARRAR: Okay.
25 MS. CLARK: I think there's a simple

1 answer.

2 JUDGE FARRAR: What?

3 MS. CLARK: That what is going to be

4 before this Board for decision is the record of this

5 hearing. The OI report is not --

6 JUDGE FARRAR: Wait. What's before this

7 Board is a charging document.

8 MS. CLARK: Right, and the factual record.

9 The OI report is not even in evidence in this case.

10 JUDGE FARRAR: No, I'm not talking about

11 the OI report. I'm talking there's a charging

12 document. If that charging document had no basis for

13 being issued or had a faulty basis for being issued,

14 aren't you in trouble? It's like a dismissal of an

15 indictment.

16 MS. CLARK: I submit that you are going to

17 determine whether there is a basis for that charging

18 document on the basis of the evidence of record in

19 this proceeding, not on what might be in an OI

20 investigation report. It's not even in the record

21 here.

22 JUDGE FARRAR: No, I --

23 MS. CLARK: So how on earth --

24 JUDGE FARRAR: -- I'm talking about based

25 on what was in front of Mr. O'Brien.

1 MS. CLARK: Imagine if you were to try to
2 do what Mr. Hibey suggests and look at the charging
3 document. Is the theory that you would then go out
4 and obtain the OI investigation report and make your
5 judgment based on whether the charging document is
6 supported by that?
7 I mean, I just think fundamentally the
8 whole --
9 JUDGE HAWKENS: Ms. Clark, you're
10 suggesting that the evidence before us --
11 MS. CLARK: Is what --
12 JUDGE HAWKENS: -- shows deliberate
13 misconduct. It wouldn't make a lot of sense to on a
14 procedural ground reverse it and remand it for
15 reconsideration if we already have determined that
16 deliberate misconduct occurred based on the evidence
17 before us.
18 MS. CLARK: Correct, and I believe that
19 the only thing that you can use to judge this case is
20 what's in the record.
21 JUDGE FARRAR: Very well. We can't argue
22 this anymore. Brief it for us. We'll admit the
23 document for what it's worth and we'll argue about it
24 later.
25 (Whereupon, the document previously

1 marked as Geisen Exhibit No. 27 for
2 identification was received in evidence.)
3 JUDGE FARRAR: Geisen 28 is the strategy
4 form involving the new documents. Any objection to
5 that?
6 MR. GHASEMIAN: No, Your Honor.
7 JUDGE FARRAR: Okay. Then that will be
8 admitted.
9 (Whereupon, the document previously
10 marked as Geisen Exhibit No. 28 for
11 identification was received in evidence.)
12 JUDGE FARRAR: That takes care of all of
13 the exhibits?
14 And we talk about briefs. Before I
15 forget, you all may want to look at this case: U.S.
16 v. Steel Tank Barge, H1651, 272 F.Supp. 658 (1967).
17 It's a case about how the government has to make sure
18 that its systems work properly so that a just result
19 is reached in the end. That's a duty of the
20 Government towards its citizens and towards barge
21 owners and things, and there is a footnote in there
22 about audi alteram partem, hear the other side, which
23 you may think does or does not go to the question of
24 whether Mr. Geisen should have had the opportunity to
25 tell his story to these people, which I think Mr.

1 Luehman said is a not unusual procedure, whether he
2 should have had that opportunity.
3 And then that, of course, ties in with our
4 exclusionary rule analogy.
5 MS. SEXTON: Do you know the number of the
6 footnote?
7 JUDGE FARRAR: Oh, yes. Number 1.
8 MS. SEXTON: Okay.
9 JUDGE FARRAR: Eastern District of
10 Louisiana, 1967. It's important to me. It states
11 principles that I think are very important,
12 particularly in cases like this, and since at least
13 one of us would be likely to refer to it in our
14 opinion, whether that be a majority concurring,
15 dissenting or whatever, I wanted you to have a look at
16 it before we did that.
17 Here's what we thought. This case is very
18 alive in our eyes right this minute, and we don't want
19 it to get stale. Today is the 12th. What we would
20 like both sides to do simultaneously is by the night
21 of the 23rd, 11 days from now, file a five-pager --
22 (Laughter.)
23 JUDGE FARRAR: Pick up your pencil, Ms.
24 Sexton. It's going to be all right. File a five-
25 pager that makes the key points in your case with

1 exhibit and transcript references, you know. Mr.
2 Hibey will say, you know, Mr. Geisen signed off on
3 this document but he didn't have it in mind, and he's
4 cite his testimony. You know, that kind of high level
5 thing because what we'd like to do while all of this
6 evidence is fresh and we get those in our minds is we
7 can start to frame where we're headed with a decision.
8 It's a complicated case. It's fresh now,
9 and if we -- we hate to put you to that burden, but if
10 we had that, we would be able to sit down and say,
11 "Ah-ha, yep, that's right. It looks like this side
12 wins," or "that side wins."
13 Then that would form the backbone of your
14 overall brief which ordinarily is due in 30 days.
15 JUDGE HAWKENS: Thirty days after the
16 closing of the record. We can change that.
17 JUDGE FARRAR: Well, 30 days. I mean, the
18 reg. says 30 days from the closing of the record, but
19 we're allowed to set our own guidelines. We wanted to
20 do 30 days from today, but allow some extra time. The
21 16th of January.
22 So what happens, the Staff has the burden.
23 They would fine in 30 days or by the 16th, however
24 many days that is, 35 days, I guess, with a lot of
25 holidays in there.

1 Then under the rules, the other side gets
2 ten more days. They're supposed to be writing their
3 brief now, but they get ten days to get the staff
4 brief and then reshape their brief. We gave the Staff
5 four more days. We'll give Mr. Geisen four more days
6 because between the 16th and the 30th you probably
7 can't get to your office for several of those days,
8 given the events that will be happening downtown. So
9 Mr. Geisen would have 14 days after the Staff brief.
10 And if the Staff gets an extension, which
11 we wouldn't like, your 14 days would automatically run
12 from the extended time.
13 And then the Staff --
14 JUDGE HAWKENS: Which if the Staff does
15 not get an extension, it would be due the 30th.
16 JUDGE FARRAR: Right, and then under the
17 rule, the Staff has a reply that's due in five days.
18 So we will give you the end of that week, February
19 6th.
20 What we'd like in those briefs is all the
21 points to the extent you think they're worthwhile.
22 You can say exclusionary rule has no business here,
23 but you do that at your peril. Maybe it has no
24 business. We come up with a lot of ideas, and you're
25 welcome to talk us out of them.

1 So all of the points we had, obviously
2 your proposed findings of fact and conclusions of law,
3 and we would intend that whoever wins, we would
4 probably do what most district judges do and not
5 wholesale adopt your proposed findings, but you know,
6 pretty much work with them. So if you want to defend
7 your result on appeal, give us some good proposed
8 findings.
9 But also make sure you argue the case and
10 that there are certain over arching issues and
11 principles here. You should have a section on those.
12 In other words, you've got to convince us to adopt a
13 certain mindset from which yields your proposed
14 findings. So don't -- you all will figure out how to
15 do that.
16 So those are the time frames. Any
17 questions about that?
18 MR. WISE: No.
19 JUDGE FARRAR: Is that all doable?
20 MS. CLARK: I believe so.
21 JUDGE FARRAR: Easy for you to say, Ms.
22 Clark, if you look at your two associates there.
23 So that would have us with all briefing
24 done by February 6th, and we would endeavor to get a
25 decision out as quickly as possible. This case has

1 been long delayed, and we don't want to lengthen that
2 delay.
3 When is the Government's brief due in the
4 Sixth Circuit?
5 MR. WISE: We just got a 30-day extension,
6 which I think makes it due the end of February.
7 JUDGE FARRAR: And Judge Hawkens tells me
8 that they are two or three months for oral argument.
9 MR. WISE: I think that's probably about
10 right. I think we're expecting April or May.
11 JUDGE FARRAR: Okay. We will do our best,
12 but we each have or will have certain other
13 assignments. So, Mr. Geisen, we will do our best to
14 get a decision, and you may win; you may lose; but I
15 hope you will leave the proceeding thinking you've
16 been treated fairly. So that's all we can say about
17 that.
18 And I hope the staff will feel the same
19 way so that Mr. Ghasemian doesn't have to go around
20 telling his colleagues how badly he was treated by the
21 Board Chairman. You know it's just our intensity
22 trying to make sure we get to the bottom of the cases.
23 We don't get many cases about real human beings, and
24 that's why this is very important to us, and it's in
25 that spirit that we're trying to make sure we

1 understand it.

2 Why don't we take a short, maybe ten

3 minute break, come back at ten of and have 20 minutes

4 of closing argument each?

5 Thank you.

6 (Whereupon, the foregoing matter went off

7 the record at 4:40 p.m. and went back on

8 the record at 4:50 p.m.)

9 JUDGE FARRAR: Okay. Okay. It's come

10 time to hear closing arguments of about 20 minutes

11 each. Ms. Clark.

12 MS. CLARK: Thank you.

13 This case fundamentally is about the

14 predicate to safe regulations of the nuclear industry,

15 and that is that the NRC must be able to rely on its

16 licensees to give it complete and accurate information

17 about plant conditions. If the NRC doesn't get that

18 information, there's no assurance that safety problems

19 will be addressed.

20 It's undisputed here that the NRC was

21 repeatedly provided misleading information. We were

22 provided inaccurate facts and incomplete information

23 about very significant conditions at the plant.

24 So the focus before this Board is on Mr.

25 Geisen's knowledge. We've heard a lot of testimony

1 about his knowledge, but I think there are a couple of
2 critical points that I would like to focus on, and
3 those are two things. First of all, Mr. Geisen's
4 knowledge of the limitations of inspections because of
5 boron on the head, and the second is limitations of
6 inspections because of the geometry and the inspection
7 technique that was used.
8 We heard testimony today that Mr. Geisen
9 knew. He knew about the limitations of the
10 inspections by virtue of the geometry. Mr. Holmberg
11 showed us that using a camera on a stick the way they
12 were doing it at Davis-Besse, it was impossible to
13 reach the top of the head, and Mr. Geisen knew this
14 because there was a modification out to cut access
15 holes to allow better access to the head. He
16 testified that that modification had been outstanding
17 since 1994.
18 We also know that Mr. Geisen knew about
19 the boron on the head. Even before the bulletin was
20 issued, Mr. Geisen personally was in the twelfth
21 refueling outage., and while he was there, he saw that
22 red photo. He saw lava-like flows of boron that was
23 red in color flowing out of the weep holes. He saw
24 conditions reports saying the inspections found large
25 deposits of boron on the head, and he even signed off

1 on one of those condition reports based on the fact
2 that they had to be cleaned.
3 But it doesn't stop there. Then the
4 cleaning occurs, and the engineers as we saw in that
5 videotape can't get the boron off the head. So they
6 come to Mr. Geisen, and he approves the use of hot
7 water at pressure to clean that head.
8 So we know for a fact that Mr. Geisen knew
9 you could not get a good inspection of that head. He
10 knew that there had been a history of flange leakage
11 for years, and because of that, in fact, the head had
12 never been cleaned up until 12RFO.
13 Now, Mr. Geisen was well aware of the
14 issues that were addressed in that NRC bulletin. He
15 knew that they had found cracking at Oconee, and that
16 the only indication were those small, popcorn-like
17 deposits on the top of the head. Therefore, it was
18 necessary for a good, thorough inspection to insure
19 that those indications were not present.
20 There's no question here that Mr. Geisen
21 knew that as well. He knew this from his interactions
22 on the Steering Committee. He was actually briefed by
23 a representative of Oconee, and he read that
24 bulleting. This is the kind of thing that is noticed
25 in the nuclear industry.

1 Keeping that knowledge in mind, Mr. Geisen
2 repeatedly provided false information to the NRC.
3 Time and again he told the NRC that there had been a
4 whole head inspection. He told the NRC that there was
5 a 100 percent inspection. He told the NRC that he
6 could verify that all nozzle penetrations were free of
7 popcorn deposits.
8 Now, the evidence showed that his
9 involvement in this issue increased over time, and it
10 coincided with the increase in the NRC scrutiny
11 because when they gave that first bulletin response
12 which gave a very vague, incomplete response, the NRC
13 responded by saying, "We need more information. This
14 isn't enough to give us assurance."
15 After that, they got the Brian Sheron
16 call, and that's when management really got involved,
17 and that was when Mr. Geisen really was involved in
18 this whole process.
19 What did he do? He says he didn't check.
20 He didn't talk to anybody about it. He went back and
21 he looked at the old 2731 again, the thought that that
22 was sufficient information according to his story to
23 tell the NRC there was a 100 percent inspection. He
24 says that based on that serial letter, he could
25 represent to the NRC that there was 100 percent

1 inspection and he could represent to the NRC that all
2 the nozzle penetrations had been verified to be free
3 of popcorn deposits.
4 So you had a situation where he knew that
5 none of those inspections were complete. He had known
6 that all along, and he's trying to tell us that he
7 thought he was telling the truth because he had read
8 2731, and 2731 never said there was a good head
9 inspection.
10 I mean, the reality is here the story just
11 doesn't hold up, and it's just not credible.
12 So I'd like to talk a little bit about the
13 sanction. You've heard a lot of testimony today about
14 the way the NRC assessed the sanction, and when you do
15 that, and I believe you will because I think there is
16 no question here that there was a violation, I would
17 just ask you to take a few things into account in
18 particular.
19 First of all, the information that they
20 were providing was important. This was the subject of
21 an NRC bulletin. This was a matter of significant
22 safety importance. This was a matter that they knew
23 if it wasn't satisfactorily addressed would require a
24 shutdown of their plant for safety reasons.
25 And yet this information was provided over

1 and over again, and it was provided to the highest
2 levels of the NRC. This isn't a matter of just
3 signing off a report that stays in the plant because
4 we see that a lot. No, this is an NRC bulletin
5 response that's provided to the NRC, phone calls to
6 the NRC and actually coming here to headquarters to
7 talk to the Commissioner's Technical Assistant and,
8 finally, to the ACRS.
9 So I think under the circumstances, this
10 is a very significant violation, and fundamentally the
11 NRC uses its enforcement actions to send a message to
12 the industry and to all individuals in the industry
13 that this action cannot be tolerated, and when we have
14 an individual who engages in this type of blatant
15 disregard of our regulations, we simply cannot have
16 assurance that he could be trusted with a responsible
17 position in the industry.
18 Thank you very much.
19 JUDGE FARRAR: Thank you, Ms. Clark.
20 Mr. Wise.
21 MR. WISE: Your Honor, with the Court's
22 position I'm going to come around. I think if I've
23 proven anything in this trial it's that I have trouble
24 sitting still.
25 JUDGE FARRAR: Go wherever you want to

1 present it from.

2 MR. WISE: Thank you.

3 And let me start just by making a couple

4 of points on the sanction because it will come as no

5 surprise that I'd like to spend the majority of the

6 argument talking about the liability part, but I do

7 think that the Board has some interesting issues if

8 and when it gets to the question of sanction.

9 I do think a lot of the testimony you've

10 heard today will be noteworthy in part because of the

11 sense that the Board should defer to or at least

12 acknowledge the considerations that went into the

13 decision as long as it is well founded. I think there

14 are real questions about whether it is well founded.

15 We will certainly brief the issue of

16 whether infirmity means that the case can't go

17 forward, but even if that is resolved in the Staff's

18 favor, I would submit to you that what you've heard

19 today suggests that the Board owes very little

20 difference to the decision of the staff in setting

21 the penalty.

22 On the specific issue of the factors, I

23 don't think there's any question either that the Board

24 can consider things like Mr. Geisen's character, his

25 work history, his reliability. The factors are

1 preceded by language that says the NRC will consider
2 factors such as the following. It is not a bounded
3 list.
4 And to the extent that one of the factors
5 is the attitude of the wrongdoer, it is inherent in
6 that list that one of the things you are to consider,
7 I think, rightfully is the person that's before you.
8 Mr. Luehman said today one of the things they
9 consider, and he used slang, was, you know, if this
10 person is the least likely person to do this again,
11 and I would submit to you that there is evidence and
12 testimony going back to Mr. Geisen's OI interview
13 where, notwithstanding what Mr. O'Brien said, this man
14 was acknowledging his mistakes and accepting
15 responsibility, albeit not criminal wrongdoing, from
16 October of 2002 when there was no hint that this was
17 possibly a criminal charge against him or something
18 that would end up here.
19 This is genuine. You saw him on the
20 stand, and I would submit to you that you can have
21 great trust that a man of that type of introspection
22 and that type of self-criticism presents no safety
23 risk.
24 The other thing that I think you can do is
25 give him credit for the acceptance of responsibility

1 even without some situation where he has admitted
2 criminal wrongdoing. Number seven allows the staff to
3 consider the attitude of the wrongdoer and then sets
4 forth an admission of wrongdoing and the acceptance of
5 responsibility. There's a comma between the two.
6 Inherent in that, I think, is the sense that this is
7 not just limited to some criminal sense of admission
8 of wrongdoing, but that the acceptance of
9 responsibility is a different but similar concept, and
10 we'll touch on that in the briefs.
11 I don't think you need to get there
12 though. I think the evidence has been clear that Mr.
13 Geisen did not commit deliberate misconduct. Part of
14 the reason that we asked for an opportunity to do
15 closings was to get a sense for where the Board was,
16 what questions you had going into your deliberations,
17 and so I would obviously invite any questions you have
18 during this presentation, but let me start because I
19 think there were questions that the Board asked during
20 the hearing that were very relevant to the
21 consideration, and I'd like to address those things
22 specifically.
23 One of the most important things I think
24 you have to keep in mind is that in this case
25 knowledge is not exposure to individual facts. If it

1 were, then I think the evidence of the E-mails and the
2 trip reports might be more compelling. In this case
3 knowledge is an appreciation of those facts combined
4 to the point where Mr. Geisen understood that the
5 information he was providing was false.
6 And I do think that's very important, and
7 there's a distinction in this case with the
8 difference, and I think you take the June 27th
9 document that we spent so much time looking at, and
10 that is a perfect example.
11 Out of context, that document, and
12 specifically the line on the third -- the third line
13 of the last paragraph of the second page could be --
14 it's an important sentence. There's no question.
15 There was a lot of discussion about the fact that Mr.
16 Geisen had reviewed and approved this document, and
17 there's no doubt based on his own admission that
18 while he had no specific recollection of talking to
19 Mr. Goyal about it, he's sure he read it and he's sure
20 he read it closely before he approved it. There's no
21 question that on June 27th at some point during the
22 day Mr. Geisen understood that during 12RFO there were
23 large deposits of boron found on the head.
24 Now, he also understood based on that
25 document that the head had been cleaned, and the Staff

1 really can't have it both ways I don't think. They
2 can't tell you that based on a document like that, he
3 both knew two months later about 12RFO was false but
4 someone also it cannot be possible that he knew the
5 head had been cleaned. I think those things are
6 inconsistent.
7 And the problem with using documents in
8 that way is that it ignores the factors that the
9 Board asked a lot of questions about, and quite
10 frankly, I think probably understands much better than
11 I do or Mr. Hibey does about what Mr. Geisen was going
12 through as the manager of design based engineering.
13 He was not only working on a single issue at ny point
14 during this case, and during the relevant times, there
15 were the INPO things that were going on. There were
16 the preparations for the next outage. There were all
17 of the duties he had as design manager. It was that
18 job and those responsibilities, in fact, that were
19 part of the reason that he was not involved at all in
20 the drafting of 2731. It just was not part of his
21 responsibility, and the subject matter of that
22 document was not part of his expertise,
23 notwithstanding his service on the Steering Committee
24 which I think the Board now has a better picture of
25 what that means and that is was a high level, forward

1 looking committee.

2 This was not a committee where he would

3 have been involved in presenting or analyzing the past

4 information about the head.

5 But I think it's more than that, and,

6 Judge Trikouros, you asked a question of Mr. Geisen

7 that I think raised as an issue that I think has to be

8 at the center of people's thought and in their mind,

9 this question of what was the role of Mr. Campbell's

10 reaction; what was the role of top-down pressure.

11 And I would just submit to the Board as

12 you begin your deliberations that while that's a

13 natural thing to consider and potentially even to

14 presume, in this case there's really no evidence at

15 all that Mr. Geisen yielded to that pressure, and

16 there is, in fact, evidence in the record from Mr.

17 Moffitt, for example, who talked about Mr. Geisen's

18 character, and he was asked directly the question that

19 I'm paraphrasing now of whether he thought Mr. Geisen

20 was the type of engineer who would have yielded to

21 some pressure from the plant, and he categorically

22 rejected that.

23 More relevant to this question though, I

24 think, is the question of motive because while motive

25 is not an element of deliberate misconduct, it

1 certainly is something that the Board can explore to
2 see whether a person who acted in a certain way would
3 have reason to act in a certain way.
4 And when I talk about motive, what I'm
5 talking about is this. If the bulletins had been
6 asking about activities that Mr. Geisen had engaged in
7 in the past and he had reason to believe that truthful
8 answers would either put him in a bad light or put his
9 past work in a bad light or put his department in a
10 bad light, from that I think it's easier to presume
11 that someone might have reason to make statements he
12 knew weren't true, if he had performed the head
13 inspections, if he had been in charge of the cleaning,
14 if he had been the manager of systems engineering.
15 I think you then start to have a reason.
16 In this case not only is there no evidence of a reason
17 that he would make these statements. There's not a
18 single document or piece of testimony that indicates
19 what his state of mind was, and you saw what that
20 evidence can look like. It can look like the note on
21 that document in Staff Exhibit 47 that says if the NRC
22 comes in we're wide open. It could be that. It could
23 be a witness' testimony that they heard Mr. Geisen say
24 something like that.
25 It could be a witness' testimony that he

1 was in the room when that statement was made, but
2 there's none of that anywhere.
3 We've talked a lot about Prasoon Goyal and
4 what Mr. Goyal's goal was. There's no question that
5 he sent out these documents, and I'm sure it raised
6 eyebrows when we asked Mr. Goyal not a single question
7 on cross-examination. The fact of the matter is that
8 the Board largely covered a lot of the areas that we
9 think are relevant to Mr. Goyal as it pertained to Mr.
10 Geisen because relevant to Mr. Goyal for this man's
11 purpose is the fact that Mr. Goyal, while he sent
12 these E-mails out, never came to talk to Mr. Geisen
13 about them, never highlighted any urgency or sense of
14 warning in the documents.
15 And I think if you look back at the E-
16 mails that he sent, when we look at them now with the
17 benefit of hindsight, we can characterize them
18 potentially as things that should have been read as
19 warnings. But if you look at them in real time, which
20 is harder to do, but if you go back and if you start
21 looking at these exhibits and you look at these
22 documents and ask yourself would a cc'd recipient on
23 this document believe that this was sounding an alarm,
24 the answer is uniformly no. Even the document, even
25 the E-mail that Mr. Goyal sends out after he signs the

1 green sheet, which remember was not sent to Mr.
2 Geisen, is a notation that management should know
3 this, which has two implications.
4 One, Mr. Geisen didn't know it because
5 he's saying management should know this, and, two,
6 look at who it's being sent to. I don't think you
7 have to resolve the question of whether Mr. Goyal was
8 a noble person who was trying to do the right thing
9 and was suppressed by management because there's no
10 evidence whatsoever that anything he wanted to do was
11 suppressed by Mr. Geisen.
12 In fact, I think you can ask yourself
13 whether it makes sense that he really was trying to
14 sound any alarm when he never went to his supervisor
15 above Mr. Swim with any of these concerns.
16 and I think as you look at Mr. Geisen in
17 relation to Mr. Goyal, that's the important issue, is
18 that there's nothing from Mr. Goyal's submittals that
19 Mr. Geisen should have drawn any concern from.
20 Judge Hawkens, you asked a question
21 yesterday when we were talking about the ACRS which I
22 think in essence was that you were troubled by the
23 level of detail that Mr. Geisen used when he was
24 talking, and couldn't one infer from that level of
25 detail that the person who was speaking had actually

1 seen the videotape, which I think is a very fair
2 question.
3 When we give you the briefs, I will ask
4 you to look at a number of things because I think --
5 and it's dangerous for a lawyer to say this -- but I
6 think notwithstanding Mr. Geisen's testimony and
7 recollection as he sits here six years later, what the
8 record clearly shows is that on a number of occasions
9 his basis of knowledge was greater than, say, for
10 example, just having read 2731 before October 3rd or
11 just having read 2731 before the conversation at the
12 ACRS.
13 His OI interview is in the record. At
14 page 79 of that document, and we'll cite it in the
15 briefs, there is a discussion about how Mr. Geisen
16 knew or why he believed that some of the past
17 inspections had focused on the flanges, and he talks
18 at that point, six months after the discovery of the
19 hole in the head, about recalling that at one point
20 when he was Outage Central in 2000 there was some
21 discussion about how they would videotape the service
22 structure and videotape the flanges.
23 I'm not suggesting to you that that was
24 the sole basis for what he said that day at the ACRS,
25 but what the record shows, I think is that there were

1 a number of things that accumulated to his knowledge,
2 the same way the staff would have you believe that the
3 E-mails and trip reports accumulated to the negative
4 knowledge.
5 For example, before October 3rd, what we
6 know is that he had read 2731. We also know that
7 there were the meetings, the prep meetings on October
8 2nd that the Board will see the agendas for, and I
9 think you can draw reasonable inferences from what
10 those agendas show. They show a bullet point for
11 discussion of the past inspections with the bracketed
12 name of the person who did the inspections and was in
13 charge of the head.
14 Now, does Mr. Geisen have a present
15 recollection as he sits here now that Mr. Siemaszko
16 discussed the inspections? I don't think he said that
17 to you, but I don't think that means that the board
18 can't deduce that there were these things going on
19 because what you know is that nowhere in 2731 does it
20 say that the 2000 inspection there were five or six
21 nozzles precluded.
22 But Mr. Geisen is shown to have said that
23 in some of the notes that were taken during that
24 meeting, and I think what you have to ask yourself in
25 that context is when I look at Mr. Geisen on the stand

1 does he appear to me to be someone who, while
2 definitely eager and willing to speak about things
3 when maybe he should have deferred to others, is he
4 someone that appears to me would just pull things out
5 of thin air and make them up?
6 And I think that having seen him, the
7 answer to that has got to be that that's not the type
8 of person that he is. He's a very curious man. He
9 certainly had taught himself much after the discovery
10 of the hole, but the suggestion that he would make
11 these things up, I think just isn't supported by the
12 record.
13 So what do you look at when you look at
14 what his knowledge base could have been? And I think
15 what the Board will see as you look back at some of
16 these documents is the documents like the august 17th
17 E-mail from Mr. Goyal that said can we go back to 1998
18 which was the last time there was a good inspection,
19 not taking credit for 2000. The Staff points at that
20 as a knowledge E-mail.
21 I would suggest to you that that actually
22 is an E-mail that could have very easily formed his
23 believe at the time that '98 was a good inspection.
24 He already knew that 2000 was not a good inspection.
25 The idea that they couldn't take credit for 2000 would

1 not have set off a single bell for a person who had
2 seen the red photo, which I think is another important
3 exhibit.
4 The reason that the Office of Inspector
5 General conclusion that the resident inspector at
6 Davis-Besse had the red photo was important is not
7 because it shows the NRC staff was somehow engaged in
8 the coverup. Mr. Geisen saw the red photo. Our
9 entire point with the red photo is that now with the
10 discovery of the hole in the head, anybody who looks
11 at that photo says that looks terrible. There's no
12 question it looks awful.
13 What Mr. Geisen has said is that when he
14 saw that, it did not set off alarms that there was a
15 pressure boundary leakage issue. It was the kind of
16 photograph that made him a year and a half later doubt
17 the word of people who he believed had actually done
18 the inspections and he had no reason to doubt, and I
19 would submit to you the relevance of the suggestion
20 that the resident inspector had the photograph is that
21 other trained minds also were not alarmed by it.
22 I don't doubt Dr. Hiser when he sits here
23 and tells you that the red photo, if he had seen it,
24 he would have shut the plant down. All we've
25 suggested to you from the start about Dr. Hiser is

1 that he is looking at things now with the benefit of
2 hindsight and through the frame of knowing that there
3 was a significant issue at Davis-Besse, and I don't
4 think that that is really at question.
5 In terms of actions, i said to you before
6 that there were no E-mails; there were no documents
7 that showed any knowledge or intent to deceive. And
8 I will agree that the one event that comes closest to
9 that is the November 8th meeting, which is the meeting
10 where Dr. Hiser says that Mr. Geisen showed the
11 videotapes, and I think that's why the Staff put
12 evidence on it even thought it's not in the order.
13 That day, I think, only suggests some
14 potential for deceptive behavior though until you
15 understand the context of what went on. Dr. Hiser
16 tells you that there were portions of the tape that he
17 knows he didn't see. I will talk to you for 30
18 seconds about this and will brief it more.
19 But I'm not sure you can trust that
20 conclusion, although I believe he wholeheartedly
21 believes it. There are pictures that he -- there are
22 portions of the tape that he told the Board he is sure
23 he didn't see because he would have shut this plant
24 down that are very similar to the pictures in 2744,
25 and there's no doubt that he looks at them now with a

1 very different view, but remember what he said to the
2 OI about what he was thinking at the time about what
3 was a sufficient view to clear a nozzle?
4 There are pictures in 2744 that show a
5 nozzle in the front and a nozzle in the back with a
6 significant amount of boron around the back side, and
7 so for Dr. Hiser to now say that he's absolutely sure
8 -- and he didn't use the word "absolutely" -- but he's
9 sure that he didn't see a portion of the video because
10 it would have triggered this quick response, but to
11 not have had the same response from the picture I
12 think shows kind of how his mindset has changed with
13 the knowledge of the cavity.
14 And if the only reason that he's going to
15 tell you that that's not valid is because he thinks
16 the picture in 2744 that he got wasn't as good as the
17 one that the staff has stipulated was the actual
18 picture that was submitted, I don't think that gets
19 the staff home on November 8th.
20 But you look at what else happened that
21 day. Mr. Geisen recalls playing the first tape the
22 full way through. Dr. Hiser says he's sure he didn't
23 see it because if he had seen what he later saw when
24 he was sitting with the OI agents, he would have shut
25 the plant down.

1 The tape you will see if you run it is 27
2 and a half minutes long. The '98 tape is 40 minutes
3 long. Dr. Hiser recalls the entire meeting being an
4 hour and a half to two hours. Mr. Geisen, I believe,
5 testified it was shorter than that. But there's no
6 question that there was time to view it all.
7 Now, I'm not sure you need to resolve that
8 question. Whether he viewed it all or whether there
9 were portions that were not shown, the other thing
10 about what happened that day that you know is that Mr.
11 Geisen was given the assignment that day, wasn't told
12 that he was going to be doing it, didn't have prior
13 notice that they were going to be asking for the
14 videotapes, didn't have time to look before at what he
15 was going to view, and didn't do anything consistent
16 with deceptive behavior in that room; never refused to
17 stop the tape when they asked him to; never fast --
18 never continued to fast forward it when they asked him
19 to.
20 And so if what you believe is what I think
21 Dr. Hiser was hinting at in direct, which was that
22 somehow Mr. Geisen was selectively showing portions of
23 the tape, you have to believe that he is one of the
24 great river boat gamblers in the history of the NRC;
25 that he walked in there that day knowing that they had

1 been making false representations for a month and a
2 half, knowing what was on those tapes and thought,
3 "I'm just going to go see if I can go in there and get
4 away with not showing them the bad stuff."
5 I just don't think that's realistic. I
6 don't think it's consistent with the man that you saw
7 on the stand, and there's no other evidence from any
8 other witness that suggests that Mr. Geisen was
9 somehow complicit on that day.
10 Jack Martin I want to talk about because
11 I think at the end of the day Jack Martin may have
12 been the most interesting witness that you heard from,
13 and I would suggest to you that his demeanor on the
14 stand showed him to be quite credible, and I don't
15 know who the jackal was who told you that we had to
16 haul him out here from California so that you could
17 see him, see otherwise.
18 But the moment that I think was
19 potentially the most interesting about Jack Martin was
20 when he said something to the effect of, "I just never
21 thought these notes would be -- that this interview
22 was going to be used in litigation."
23 And I would submit to you he said it with
24 the sense of someone who was a bit stupefied that he
25 was now testifying under oath for the second time

1 about a part of his note that was clearly, by his own
2 admission, not the focus of his interview. Okay?
3 Can we pull up that exhibit very briefly?
4 Because there's something that I want the Court to
5 look at as you start your deliberations. We've
6 focused on the third paragraph, and one of the
7 questions that we talked about was -- and I think,
8 Judge Farrar, this was your question about
9 essentially, you know, how do we reconcile if we can
10 what Mr. Geisen recall and what Mr. Martin recalls,
11 and I think that's a very fair question because I will
12 concede that I don't think that you can conclude that
13 Mr. Martin was trying to deceive the Board at all.
14 What you have though is a paragraph, and
15 I would suggest that these notes are at best rough.
16 I know he said that his practice was that he would
17 often get the handwriting back and look at them, but
18 he wasn't sure he did it in this case. He may have.
19 He may not have, but even if he had there's no
20 question that what he probably was doing was focusing
21 on the stuff that he thought was important because he
22 clearly wasn't reading this to make sure everything
23 was perfect.
24 Judge Hawkens, I think, pointed out the
25 typographical error with the word "worded" instead of

1 "worried," but look at the very first sentence that we
2 looked at ad nauseam where he says, "I know became
3 aware of it." From the very first part of the
4 sentence you don't know whether he omitted the word
5 "I" or whether he omitted the word "we." Okay?
6 And in the sentence before what Dave is
7 reported to have said is, "I'm not sure when I learned
8 we had not cleaned the head completely." It's
9 possible that what was said was, "I know we became
10 aware of it." I think it's equally possible that Mr.
11 Geisen said October and Mr. Martin wrote October, and
12 when it was transcribed it was moved to August. I
13 think it's equally possible that Mr. Geisen said
14 August by mistake.
15 But what you know about this conversation
16 was that there was no further conversation about what
17 August meant, what interactions meant because that
18 just wasn't the focus of Mr. Martin's interview, and
19 so the idea -- and I don't think the staff can deny it
20 -- a huge part of their knowledge base is based on the
21 suggestion that Mr. Geisen has admitted viewing the
22 videotapes in August of 2001. It's a huge fact, and
23 if it's based only on this, which is the only evidence
24 that there is of it, and Mr. Martin says he has no
25 recollection of it, this is an inherently unreliable

1 document because you know on the face, setting aside
2 everything that I've said already, and I actually
3 think, Judge Farrar, that your melding theory may be
4 the most likely, that Mr. Martin asked when he saw the
5 videotapes and Mr. Geisen said when he was preparing
6 for interactions with the NRC, and Mr. Martin said in
7 response to the bulletin. When was the bulletin? It
8 was in August.
9 I mean all of these things are possible,
10 but what's really relevant is that you just have no
11 sense of what the context of that sentence was because
12 it wasn't the focus, and this is where you get back to
13 the issue of the integrity of the investigation
14 because there were two opportunities to figure this
15 out close in time.
16 The OI interviewed Dave Geisen, never
17 asked him about this, never asked him, never showed
18 him these notes and said, "Is this your recollection?
19 What is this about viewing the videotapes in August?"
20 and also never asked Mr. Martin about it, but traveled
21 very heavily on these at best ambiguous notes, and so
22 if that's one of the foundations of the knowledge
23 case, I think that crumbles fairly easily because this
24 document can't mean what it says.
25 There is no evidence Mr. Geisen

1 participated in any interactions with the NRC in
2 August. There's no evidence that he had any role in
3 any interaction with the NRC before October.
4 I will save our analysis of a lot of the
5 witnesses for the brief because I think they're
6 important points that the Board needs to consider. I
7 think one of the questions that has run throughout
8 this hearing is a very reasonable question that I
9 think has an answer, but also may be a slight
10 diversion because there is no question that the issue
11 you have to decide in this case is whether he actually
12 knew. It's not good enough that he should have
13 figured it out, that he should have been more
14 suspicious. There's got to be evidence that he
15 actually knew because deliberate misconduct requires
16 that purposeful conduct.
17 But the question that has pervaded this
18 trial, naturally so, is is it reasonable to believe
19 that he would have acted this way, and when you look
20 back at Andrew Siemaszko and you look back on Mr.
21 Geisen saying he relied on the information he was
22 getting from Mr. Siemaszko, I think it's quite easy in
23 retrospect, knowing what we now know, to say that it's
24 a stretch for him to say that he did rely on Mr.
25 Siemaszko.

1 What we will urge you to do is really
2 focus on what was going on in real time. Mr. Geisen
3 had no involvement with the work that Mr. Siemaszko
4 had done. He had no expertise in what Mr. Siemaszko
5 had done. He had no real understanding of what it was
6 that Mr. Siemaszko had performed and the burdens that
7 he faced in doing it.
8 Ms. Clark talks about his knowledge of the
9 limitations, and I think the record will show that
10 what Mr. Geisen said was that he believed he
11 understood that there were some problems, which is why
12 this modification had been proposed, but he also
13 thought that they had succeeded in the past both in
14 inspecting the head in 1998, at least based on Mr.
15 Goyal's suggestion that that was the last time there
16 was a good inspection, and the cleaning in 2000. So
17 the modification, while it would facilitate future
18 inspections which were already going to be facilitated
19 by this new technology, and while it would facilitate
20 cleaning, which in his mind had been successful
21 through the use of water even if that wasn't the best
22 method, was not something where he went into this
23 conversation believing these things were impossible.
24 And so what he did was he deferred to the
25 person who knew. He had no reason to doubt the man's

1 honesty or credibility. He checked his methodology.
2 He sat with him. He reviewed some of what Mr.
3 Siemaszko did, and he concluded that Mr. Siemaszko was
4 reliable.
5 There are plenty of things that the staff
6 will point to, I think, that will be arguments for why
7 he should not have maintained that reliance, and I
8 think that's where you have to rely on some of the
9 testimony of the others.
10 I think you can look at Melvin Holmberg's
11 testimony and understand why the idea that Mr.
12 Holmberg could reach conclusions based on his 2,000
13 hours of experience and his certification doesn't mean
14 that Mr. Geisen was unreliable in relying on Mr.
15 Siemaszko.
16 I think you can look at Dr. Hiser's
17 testimony and understand why it is that when Mr.
18 Geisen had a situation where initially he believed
19 that the 2000 inspection had found some boron and
20 then by October 30 was five or six, and then by
21 October 17th, it was 45 of 69, you'll recall that Dr.
22 Hiser said that when he got that same information
23 because he got it after Mr. Geisen got it from Mr.
24 Siemaszko, he viewed it as a progression and not as a
25 sign that there was some dishonesty going on here.

1 And that's really where I think you have
2 to evaluate Mr. Geisen as well.
3 We're going to brief all of these issues
4 for you clearly, but we will lead in the briefs with
5 the issues of knowledge and intent because those are
6 the seminal questions for the Board, and it is, I
7 think, a case where despite evidence of discrete facts
8 at discrete times the Board is going to have to really
9 look at what the conversation was, the E-mails about
10 Oconee showing popcorn or a pristine head in May.
11 I will never tell you those are not
12 relevant, but there's also no question that by October
13 the conversations between the NRC and Davis-Besse
14 where they are talking about five or six obscured by
15 nozzle leakage, setting aside for the moment that that
16 was proven to be untrue; there's no question that
17 during those conversations nobody was talking about a
18 pristine head, and so when you're asking about intent
19 to deceive and knowledge of untruthfulness, that's
20 where this case comes down to, and on those issues I
21 think the Board will have to conclude that Mr. Geisen
22 didn't have knowledge.
23 Thank you. We appreciate the Court's
24 patience.relied on Mr. Siemaszko, and in fact, I think
25 we never heard Mr. Geisen ever say that when he

1 testified here, and yet later on in the closing
2 argument Mr. Wise said, you know, there's nothing
3 wrong with relying on Mr. Siemaszko. He was the
4 expert here.
5 So I keep hearing these different stories.
6 I hear, you know, Mr. Geisen -- I agree -- he's a good
7 worker. I think he was probably a very good manager
8 at that plant, but I think it's easy to get caught up
9 in being a plant person and being a good worker, and
10 when you know that the plant might be shut down early
11 and management is desperate to stop that, maybe being
12 a good worker means you support your management.
13 And maybe that's what happened here, and
14 then he got caught up in these lies, and once that
15 happened first they give, you know, some kind of
16 misleading information, but it's not so blatantly
17 obviously wrong, but then the NRC starts asking for
18 more information and they want more specific
19 information, and they want to pin him down, and then
20 all of a sudden he has to start manufacturing more and
21 more lies and larger lies in order to maintain this
22 position to keep the plant from shutting down.
23 And I think an individual can get caught
24 up in that situation, an individual who is very
25 knowledgeable, intelligent, who thinks of themselves

1 as a person with integrity. People get caught up in
2 those situations, and it's unfortunate, and sometimes
3 the consequences are really significant, but the fact
4 is you have to be held accountable and responsible if
5 that's what you do.
6 So as I said, we'll brief it, but you
7 know, these sort of shifting stories -- or then there
8 was the story that maybe in that prep. meeting on
9 October 2nd somebody said something to him that he
10 can't recall and doesn't remember and has no evidence
11 of, but maybe that happened.
12 You know, we can't decide cases based on
13 speculation about what might have happened to justify
14 his actions. This is not the time to try to justify
15 what he did or rationalize what he did, and that's
16 what that sounds like to me. We have to look at the
17 facts objectively, and the facts in this case, I
18 think, are absolutely clear, and we will show you that
19 in our briefs.
20 JUDGE FARRAR: Okay. Thank you, Ms.
21 Clark.
22 Again, thank you, Mr. Wise. We look
23 forward to receiving the short briefs and then the
24 longer ones.
25 In terms of transcript corrections, we'd

1 like you all don't focus on the trivial, just the ones
2 that were essential, that we have a correction and
3 rather than submit them separately, we'd like you to
4 exchange your own and make sure you have agreement on
5 them so we're not passing on all of them. We'll pass
6 on any where you have a problem, and Andy, we'll have
7 a tape, right?
8 So the final word, if you all can't agree
9 with where the transcript was wrong, we'll go to our
10 DVDs and try to figure out what was said. But how
11 long do you all usually have for those? What's the
12 norm?
13 MR. WISE: I don't know what we have a
14 norm, but I guess we can work to it the first couple
15 of days of next week I would think.
16 JUDGE FARRAR: I don't want to hamper the
17 filing of the short briefs, and for those if you want
18 to cite to the transcript with a bracket or, you know,
19 change it to what you think it is and then we'll argue
20 about it later, that would be a way.
21 We've got a lot of pages in these few
22 days. Is that a couple of day job to do transcript
23 corrections?
24 MR. WISE: I must admit I think we just
25 ordered it today. So I haven't seen it yet. So I

1 don't know how many pages we're talking about.

2 MS. CLARK: Is this per day?

3 MR. WISE: Done by nine o'clock tonight?

4 (Laughter.)

5 JUDGE FARRAR: How about the 9th of

6 January?

7 MS. CLARK: Better.

8 JUDGE FARRAR: You know, if there's

9 something before you agree on them if it's critical to

10 you in that five-pager, you know, just put a little

11 footnote that says that word was such-and-such or

12 something.

13 JUDGE HAWKENS: Right, and that will be

14 before your first set of briefs are due. So you can

15 make any corrections in the briefs.

16 JUDGE FARRAR: Okay. Then we'll look

17 forward to getting those. With that the record will

18 be closed today, subject to the transcript

19 corrections, and we'll proceed from there.

20 And since I've said different things at

21 different times, I don't have to repeat them now about

22 the case and about the marvelous presentations that

23 both sides put on in very short time, and we will make

24 our best efforts to get a rapid decision out after

25 everything is filed. That's why we wanted these five-

1 pagers, so that we could begin before we even get your
2 briefs.
3 So with that I want to particularly thank
4 our people, Andy and Joanna, for helping us. This was
5 a good test of our electronic system, and thank you.
6 We'll come down and say goodbye to all of you.
7 The hearing is adjourned.
8 (Whereupon, at 5:37 p.m., the hearing in
9 the above-entitled matter was concluded.)
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: Evidentiary Hearing

Docket Number: IA-05-052;

ASLB No. 06-845-01-EA

Location: Rockville, Maryland

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

Eric Mollen
Official Reporter
Neal R. Gross & Co., Inc.