

February 5, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NRC STAFF'S REPLY TO MR. GEISEN'S POST-TRIAL BRIEF WITH PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

On December 12, 2008, at the adjournment of the five day enforcement hearing in this proceeding, the Atomic Safety and Licensing Board ("Board") set the post-hearing briefing schedule. Tr. 2304-05. Accordingly, on January 16, 2009, the Staff filed "NRC Staff Proposed Findings of Fact and Conclusion of Law." On January 30, 2009, Mr. Geisen, through counsel, filed "Post-Trial Brief of David Geisen with Proposed Findings of Fact and Conclusions of Law" ("Geisen's Brief"). The Staff hereby submits proposed findings that respond to Geisen's Brief.

Mr. Geisen requests that the Board schedule final oral arguments after all briefing has been completed. In the interest of expediting the Board's decision in this case, the Staff requests that the Board decline to insert additional and unnecessary steps in the adjudicatory process. The parties have had ample opportunities to present their positions in briefs, teleconferences and opening and closing arguments at hearing.¹

¹ Prior to the hearing (after the recommencement of the proceedings following Mr. Geisen's criminal sentencing), the parties discussed matters relating to issues of collateral estoppel and due process (among others) during pre-hearing conference calls on July 21, 2008 and October 23, 2008. On November 17, 2008, the Staff filed a motion on collateral estoppel after which Mr. Geisen filed a brief on November 26, 2008 in opposition to the Staff motion on collateral estoppel. On December 3, 2008, the parties filed pre-hearing statement of their (continued. . .)

Mr. Geisen has articulated no reason why further briefing or argument would assist the Board in reaching a decision. However, should the Board allow additional argument, the Staff requests that it be limited to the specific issues on which the Board believes oral argument is necessary.

REPLY FINDINGS

Mr. Geisen claims that he did not have personal knowledge about the actual limitations on head inspections and, therefore, did not know that his statements were misleading. To support that argument, he claims that the Staff has improperly assumed that he knew everything his subordinates knew. As explained below, this claim is not supported by the evidence. The Staff's case rests on information that Mr. Geisen personally received, read, reviewed, approved or saw for himself.

The evidence of Mr. Geisen's personal knowledge is overwhelming. He received information about inspection limitations from multiple sources and on many occasions. The information was clear and consistent. And, as discussed below, Mr. Geisen's refutation of that evidence is unavailing. The Staff's evidence, taken in its totality, establishes that Mr. Geisen knew that the submissions to the NRC in which he participated were inaccurate and incomplete. Therefore, the Staff has more than satisfied its burden to establish Mr. Geisen's knowledge by a preponderance of the evidence.

(. . .continued)

respective cases. During the hearing, the parties summarized their respective positions in opening and closing arguments. Thereafter, post-hearing briefs were filed on December 23 and 24, 2008. On January 16, 2009, the Staff filed its 98 page (excluding attachment) proposed findings of fact and conclusions of law which was followed by Mr. Geisen's 48 page proposed findings of fact and conclusions of law on January 30, 2009. On that same day, the Staff filed its supplemental brief responding to the Board's December 31, 2008 questions regarding issues of collateral estoppel and due process.

Mr. Geisen also raises a new theory in his findings, suggesting that his representations to the NRC were premised upon inaccurate information he was provided by Mr. Siemaszko. This theory, however, is inconsistent with Mr. Geisen’s testimony at the hearing. During the hearing, Mr. Geisen repeatedly professed no knowledge of the actual condition of the head except what he learned from reading the wholly inadequate information provided in Serial Letter 2731.

Mr. Geisen also misrepresents his actions during the October 3, 2001, teleconference. As explained below, it is clear that he told the NRC that Davis-Besse had conducted a 100% inspection of the head although he knew that wasn’t true. Finally, he attempts to avoid responsibility for his actions by pointing to the culpability of others and making unfounded allegations of impropriety on the part of the Staff’s Office of Investigations (“OI”) and Office of Enforcement (“OE”). However, this case is about Mr. Geisen’s actions, not those of other Davis-Besse employees or the Staff.

I. KNOWLEDGE

A. The Evidence Demonstrates Mr. Geisen’s Knowledge

1.1 Mr. Geisen claims that the Staff relied on evidence showing the knowledge of his subordinates and improperly imputes their knowledge to him. However, this claim is not supported by the record. All of the evidence of Mr. Geisen’s knowledge concerns information he personally received, reviewed, concurred on, approved or observed. This evidence, when considered in its entirety, demonstrates that Mr. Geisen knew that inspections of the reactor head were limited by the restricted access allowed by the small weep holes and by large accumulations of boric acid.

1.2 The evidence before the Board demonstrates that Mr. Geisen was informed, repeatedly and from many sources, that the entire head could not be viewed

using a camera on a stick inserted through the weep holes at the bottom of the head. He was also informed that substantial boric acid deposits had accumulated on the top of the reactor head which would obscure the small, popcorn like deposits indicative of nozzle leakage.

1.3 This evidence included information provided to Mr. Geisen in numerous e-mails and trip reports, which Mr. Geisen testified he read. He had more than sufficient training and experience to understand this information. He also knew of the significance of this information and the importance to Davis Besse, which was responding to a significant safety concern identified by the NRC. These facts support our conclusion that Mr. Geisen knew that the information submitted to the NRC representing that the head was free of indications of nozzle leakage was inaccurate and incomplete.

1.4 These documents also told him that head inspections had been impeded because of limited access to the head through the weep holes and because of substantial boric acid deposits on the head. Mr. Geisen testified that he read trip reports and e-mails and did not need to discuss the information with the senders because he either understood or already knew the content. See *e.g.* Tr. 1600, 1867. These statements alone demonstrate that Mr. Geisen knew that Davis Besse head inspections were not sufficient to verify whether indications of nozzle leakage were present.

1.5 However, this was only some of the information that was the source of Mr. Geisen's knowledge. During 12RFO, Mr. Geisen saw detailed descriptions of the large boric acid deposits in condition reports and a photograph showing boric acid spilling out of the weep holes at the bottom of the head. He not only read the condition reports, but he also signed off on a mode restraint after determining that the underlying problem would be addressed by cleaning the head. He participated in a discussion

about how to clean the head because the boric acid deposits were so large and had become so hardened that they could not be removed using ordinary cleaning techniques. Mr. Geisen approved the spraying of hot water at high pressure on the head to attempt to clean those deposits.

1.6 Mr. Geisen read the Outage Insider, which told him that Davis Besse had a longstanding history of leaking flanges that had caused boron to accumulate on the head and that the head had not been successfully cleaned before 12RFO. We know he read it, because he claims that it was the basis for his belief that the head had been successfully cleaned during that outage. Tr. 1586-87.

1. Mr. Geisen Knew about the Modification

1.7 Mr. Geisen knew that inspection of the entire head was not possible using the technique employed – a camera on a stick inserted through the weep holes – because he knew that larger access holes had to be cut into the head.

1.8 In Geisen's Brief, Mr. Geisen states that "[n]one of the modifications on which Mr. Geisen was focused during the 2000 outage had to do with the inspections or cleaning of the head."² However, this is simply because the modification to cut access holes, which had been outstanding since 1994, had been repeatedly deferred and therefore was not implemented during the 2000 outage.

1.9 The evidence established that, by the 2000 outage, Mr. Geisen knew that a modification to cut access holes had been requested in order to obtain access to inspect the entire head. Tr. 1958-59.

² Geisen's Brief at 9, #16.

2. Mr. Geisen Knew about the Condition of the Head from Gibbs' Report

1.10 Mr. Geisen also learned that access to the head was severely restricted and that large boric acid deposits had accumulated on the head from reading the September 14, 2001, Gibbs' Report.

1.11 The evidence demonstrates that Mr. Gibbs left the report on Mr. Geisen's desk, and Mr. Geisen read the report. Tr. 1893. Given the fact that the report was directed to Mr. Geisen's immediate supervisor and involved matters under Mr. Geisen's responsibilities (Tr. 1887) it is likely that he considered it high priority and read it soon after receiving it. However, even accepting that he may have delayed reading it because of other work responsibilities with the INPO evaluation, those responsibilities ended in September. Therefore, we can assume that he must have read it before the October 3, 2001 teleconference.

1.12 Further, the Staff does not overstate the significance of the Gibbs' Report as alleged by Mr. Geisen.³ The Board's concern about the Gibbs' Report is not about whether it directly stated that Serial Letter 2731 is "false and misleading" or whether it called into question Mr. Siemaszko's credibility;⁴ rather, the Board notes that the Gibbs' Report alerted Mr. Geisen that:

- The RPV head had not been successfully cleaned during 12RFO⁵

³ *Id.* at 34, #108.

⁴ *Id.*

⁵ The Board notes that Mr. Geisen was well versed in the cleaning process during 12RFO due to his participation in the decision to use hot water at pressure to clean the head after mechanical means were unsuccessful.

- That even after two different unsuccessful cleaning efforts (using mechanical means and heated water at pressure) there was still “boric acid crystal deposits of considerable depth left in the center top area of the head”
- The mouse holes provided “severely restricted access”
- Service structure access holes were still necessary⁶

1.13 Mr. Gibbs stated that he was “concerned that the actual conditions [of the head] had not been communicated” in Serial Letter 2731. Staff Ex. 75 at 844. He described the purpose of his report as an attempt to:

provide a caution to Mr. McLaughlin and others in this letter. That caution was, look, you indicated that there -- in no way the inspection be compromised, but, in fact, you have boric acid on the head, and the only conclusion one could draw based on the whole thrust of the inspection requirements is that it would compromise the inspection.⁷

1.14 The information in the Gibbs’ Report told Mr. Geisen that information FENOC provided to the NRC regarding head inspections was not accurate and complete. Mr. Geisen admitted that information provided in the Gibbs’ Report was related to matters that were a part of his responsibility as Design Basis Engineering Manager and would be important to review in the course of his duties. Tr. 1887. Further, the information in the Gibbs’ Report would have been immediately instructive to Mr. Geisen, a man who had far greater familiarity with Davis-Besse’s past inspections, the Bulletin, and the Oconee and Crystal River findings than Mr. Gibbs’ had.

1.15 Therefore, we find that he read the Gibbs’ Report prior to the October 3, 2001 teleconference, and that it had the immediate effect of again alerting him to the

⁶ Staff Ex. 44 at 1.

⁷ Staff Ex. 75 at 845.

significant amount of boron on the head entering 12RFO that would have precluded inspection of the RPV head. This information contradicted the inspection information Mr. Geisen approved or personally told the NRC, in violation of § 50.5(a)(2).

3. Mr. Geisen Knew about the Condition of the Head by Reviewing Videotapes

1.16 In March 2002, Mr. Martin interviewed Mr. Geisen to conduct an investigation to determine who knew that boric acid was left on the vessel head after 12RFO and when they knew it. Tr. 1481.

1.17 Mr. Martin interviewed Mr. Geisen very shortly after the discovery of the reactor vessel head degradation. In his notes, Mr. Martin attributed to Mr. Geisen the statement, “I know became aware of it in reviewing the videos of the inspections while preparing for the NRC interactions in August 2001.” Staff Ex. 63; Tr. 1483.

1.18 In assessing the credibility of Mr. Martin’s notes, we rely on testimony elicited from him during the hearing. We found Mr. Martin to be a very credible and knowledgeable witness. His practice in preparing his notes does not cast any doubt on their reliability. Therefore, we accept his notes as reliable and credible evidence that Mr. Geisen reviewed the inspection videos during August of 2001. We decline to make any conclusions about the validity of Mr. Martin’s notes based on the testimony of Mr. O’Brien, who had no first hand knowledge about Mr. Martin’s interview. Mr. O’Brien’s interpretation of Mr. Martin’s notes is consistent with ours – that Mr. Martin’s notes show that Mr. Geisen reviewed the inspection videotapes by August 2001. Tr. 2227-28.

1.19 Mr. Geisen attempts to find an inconsistency in Mr. Martin’s notes by claiming that the term “NRC interactions” can only refer to the October 3, 2001, conference call. However, this interpretation defies logic. “Interactions” can obviously be written or oral, and can be in person or by phone. Even if one were to assume that

“interaction” would have to be personal, the evidence shows that on August 15, 2001, industry representatives (including those from Davis Besse) met with NRC representatives at NRC headquarters to discuss NRC Bulletin 2001-01. Staff Ex. 40.

1.20 Based on the totality of the evidence, including Mr. Martin’s interview notes and testimony, the Board finds Mr. Martin’s notes to have been an accurate reflection that Mr. Geisen viewed the inspection videotapes at some point in August 2001 or earlier.

1.21 Mr. Geisen asks us to infer that he could not have viewed the video tapes prior to November 8, 2001, because, if he had done so, he never would have willingly chosen to show them to the NRC, as he did on the day before the ACRS meeting. This is based on the false premise that Mr. Geisen had a choice. He did not volunteer for the job, but was assigned to do it.

1.22 Although he was not happy with the assignment, he cooperated with the NRC Staff during the meeting. This, however, was not because he did not know about the contents of the tapes. In fact, he evidenced his knowledge by advising Staff not to look at the 2000 tape because, if they thought the previous tapes were bad, the 2000 tape was even worse.

1.23 Our finding that Mr. Geisen obtained information from reviewing the video tapes, although significant, is only one of the sources of information to Mr. Geisen regarding the condition of the reactor vessel head during the past inspections.

4. Mr. Geisen Knew that the Head Cleaning in 2000 was Irrelevant to the NRC Submission

1.24 Mr. Geisen claims that, notwithstanding all of the information he obtained to the contrary, he nevertheless believed that the information he provided to the NRC was accurate because he thought that the head had been cleaned during 12RFO.

However, the cleaning of the head during 12RFO was irrelevant to the information submitted in the NRC submissions.

1.25 Nozzle leakage occurs during operation of the reactor. Therefore, the inspection of the condition of the head at the beginning of an outage, or the “as found” inspection, is used to determine whether indications of leakage are present. Since successful cleaning of the head would remove all boric acid, post-cleaning inspections would not provide information relating to nozzle leakage. The only pertinent information was from the “as found” inspections. See Tr. 1702, 1850. And Mr. Geisen knew that “as found,” the head was covered with boric acid deposits. Mr. Geisen admitted that, based on the conditions seen in the red photo, the head could not have been clean when 12RFO began. Tr. 1846.

1.26 Further, Mr. Geisen knew that cleaning using ordinary techniques had been unsuccessful during the 12RFO. For that reason, he had approved the use of high pressure hot water to try to remove the extensive boron deposits on the head. It is obvious that pressurized water would be able to reach areas at the top of the head that could not be seen by a camera mounted on stick. Therefore, we reject Mr. Geisen’s claim that successful cleaning using pressurized water meant that the head had become fully accessible to inspection using a camera on a stick.

B. Mr. Geisen’s Responsibility for the Inaccurate and Incomplete Information

1.27 Mr. Geisen attempts to deflect attention from his culpability by pointing to the responsibility of others. However, the question of whether others should be held accountable for their part in deceiving the NRC is not before us in this proceeding. Therefore, we decline to speculate on the culpability of other FENOC employees or the

opportunities others had to correct the inaccurate and incomplete information that was submitted to the NRC.

1.28 It is axiomatic that the Board cannot adjudicate Mr. Geisen’s liability by focusing on what could have, but did not, happen. Our decision is not based on speculation about how deception of the NRC could have been avoided. Our analysis is based on the evidence regarding Mr. Geisen’s actions and the information he received from various sources in light of Mr. Geisen’s background, experience and own testimony.

1.29 The evidence establishes that Mr. Geisen received information from written communications, videotapes and photographs regarding the extent of the head inspections and the results of those inspections. That information told him that the inspections were limited for two reasons. The top of the head could not be visualized using a camera on a stick. In addition, extensive boric acid deposits prevented visualization of many nozzle penetration interfaces.

1.30 Mr. Geisen knew this information when he signed the green sheet as one of the management individuals responsible for the technical accuracy of Serial Letter 2731. He signed off on the technical accuracy of Serial Letter 231 not only once, but twice, on separate days. Mr. Geisen stated that he read it to determine whether it “made sense to what he knew and verified” that the appropriate people had signed off on it.⁸ The Board finds that Mr. Geisen would have seen obvious inaccuracies in the document. As outlined in the Staff’s Proposed Findings, Mr. Geisen had specific knowledge that

⁸ Geisen’s Brief at 8, #12.

contradicted various portions of Serial Letter 2731, yet he still affirmed the technical accuracy of Serial Letter 2731. As such, he violated 10 C.F.R. § 50.5(a)(2).

1.31 According to Mr. Geisen, he subsequently received additional information regarding past inspections from Mr. Siemaszko, who was responsible for reviewing the inspection tapes for the purpose of developing a nozzle-by-nozzle table requested by the Staff. According to Mr. Geisen, he spoke with Mr. Siemaszko before the October 11, 2001 Technical Assistants' (TAs) briefing about the methodology he was using to develop the nozzle-by-nozzle table. Tr. 1698. After the TA briefing, he saw the completed table.

1.32 Mr. Geisen testified that he accepted Mr. Siemaszko's methodology and described the methodology in some detail during the hearing. He never, however, testified that Mr. Siemaszko told him that the inspections verified that all nozzle penetrations were verified to be free from popcorn type deposits. When asked for the source of that statement, Mr. Geisen testified that it was from the information in Serial Letter 2731, not from Mr. Siemaszko. Tr. 1931. Therefore, it is puzzling that Mr. Geisen says in his Findings:

99. Two events occurred during this time period that would reasonably have caused Mr. Geisen to question Mr. Siemaszko's credibility and his competence. The first was the discovery that Mr. Siemaszko's initial representations about the completeness of the 1998 and 2000 inspections were inaccurate. . . .

.....
101. With regard to the change in Mr. Siemaszko's opinion regarding the 1998 and 2000 inspections, Mr. Geisen testified that he was not surprised that Mr. Siemaszko's detailed review led to more detailed results. Tr. 1727. . . .

1.33 In these findings, Mr. Geisen is suggesting an entirely new theory – that Mr. Siemaszko provided him with the inaccurate information he relayed to the TAs, and

that Mr. Siemaszko later changed his story, after the TA briefing. This theory cannot be reconciled with what Mr. Geisen told us during the hearing. This is an example of the constantly shifting story Mr. Geisen has presented to avoid culpability for his actions. At the hearing, he asked us to believe that he had no reason to believe that his statements to the TAs were inaccurate because he did not know the results of Mr. Siemaszko's review. According to Mr. Geisen's testimony, the only information he got from Mr. Siemaszko before the briefing concerned the methodology used to develop the table. Now, however, he asks us to believe that he told the TAs that the inspections verified the absence of popcorn deposits based on what Siemaszko told him, and he was later dismayed to find out that what Mr. Siemaszko told him turned out to be incorrect.

1.34 This new, alternative story is unsupported by the evidence. Notably, the findings are devoid of references except the transcript at 1727. In fact, the transcript shows that Mr. Geisen never said that Mr. Siemaszko spoke to him after the TA briefing although this was suggested by counsel. Tr. 1723, 1727. Mr. Geisen said that he realized that he had misled the TAs when he saw the table once it was complete. As he put it, "[Siemaszko] didn't try to hide anything from me. He just provided me exactly what I asked him for which was a nozzle by nozzle with two years or two inspections on there." Tr. 1728.

1.35 This presentation of alternative and inconsistent stories undermines Mr. Geisen's credibility. There is simply no evidence to support a theory that Mr. Geisen provided inaccurate information because he had been misled by Siemaszko or anyone else at Davis-Besse.

1.36 Mr. Geisen's claims that other individuals could or should have corrected his misstatements to the NRC does not mitigate his responsibility for those statements.

Mr. Geisen implies that his culpability for those statements should be limited because: (1) no one at the October 2, 2001 preparation meeting expressed concern about Serial Letter 2731;⁹ (2) Mr. McLaughlin and Mr. Siemaszko were associated with discussions of the 1998 and 2000 inspection and head cleanings in the October 2nd agenda;¹⁰ and (3) that the Framatome representatives did not object to any information presented.¹¹

1.37 Our charge in this hearing is only to determine whether Mr. Geisen provided inaccurate or incomplete information to the NRC. Whether other individuals share responsibility because they could have corrected the information is not relevant to our decision. Mr. Geisen knew that his statements to the NRC were not accurate because he knew it was not possible to view the area of the top of the head, including many more than 5-6 nozzles. He also knew that the inspections were further limited by boric acid deposits which prevented visualization of those portions of the head which could be viewed during the inspections.

II. MR. GEISEN'S STATEMENTS DURING OCTOBER 3rd TELECONFERENCE

2.1 Mr. Geisen's statements during the October 3, 2001, teleconference were captured in contemporaneous notes prepared by Mr. Miller, Mr. Holmberg and Mr. Hiser. Those notes are consistent with Mr. Holmberg's account that Mr. Geisen told the NRC that 100% of the head had been inspected, although boric acid deposits precluded any conclusions as to whether indications of nozzle leakage were evident for 5 - 6 nozzles at

⁹ *Id.* at 21, #59 .

¹⁰ *Id.* at 21, #61.

¹¹ *Id.* at 23, #66.

the top of the head. These notes are consistent with Mr. Geisen's later statements that Davis-Besse had conducted a "whole head inspection" and "entire head inspection."

2.2 Mr. Geisen was responsible for multiple statements representing that Davis-Besse had performed inspections of the entire head. Indeed, that premise was fundamental to FENOC's case to the NRC – that there was no need to shut down for an inspection. Mr. Moffit's self-serving statement many years after the fact that he never heard Mr. Geisen say the entire head had been inspected because he would have known it was wrong – and presumably would have corrected it – is not supported by the documentary evidence.

2.3 While Mr. Geisen concedes that he told the NRC that 100% of the head had been inspected, he claims that he meant they were not "sample" inspections. Given the fact that the purpose of the teleconference was to obtain clarification as to whether the inspections were sufficient to see indications of nozzle leakage, such a response would be misleading at best. Mr. Geisen knew very well the NRC was not asking about sample inspections. Indeed, the testimony at hearing established that neither the NRC nor Mr. Geisen had ever heard of licensees performing sample head inspections.

2.4 Further, Mr. Geisen's representation that definitive conclusions could not be reached for a specific number of nozzles cannot be reconciled with a sample inspection. If only a portion of the head were looked at, it would be impossible to know exactly which nozzles were obscured by boric acid deposits.

III. THE ENFORCEMENT SANCTION

3.1 Mr. Geisen takes issue with the Staff's enforcement process as conducted by OI and OE.¹² However, the Board reiterates that this enforcement hearing, and particularly the sanction portion, is not about OI or OE or the enforcement process. Those issues are entirely irrelevant to the matter at hand.

3.2 Further, even if it were in any way relevant, there was no testimony or evidence presented at the hearing by OI regarding the specific process it followed, the evidence it investigated, or the documents it had in its possession at any exact time during its investigations. The Staff was not permitted access to OI to protect grand jury secrecy; therefore, the Staff (counsel and Mr. O'Brien) does not know the extent or reasons for OI's investigatory methods. Tr. 2154, 2168. Any suggestion that the Board is able to make findings on those issues is contrary to the evidence presented at the hearing. Further, without allowing OI to address these issues, it would be fundamentally unfair to reach any conclusions about OI's work.

3.3 We do note that the Staff did present evidence that showed OE followed the process as outlined in the Enforcement Policy.

3.4 Finally, we observe that the Board is guided by the Commission's Enforcement Policy. Therefore, our determination of the appropriate sanction is based

¹² *Id.* at 43-47.

on the Enforcement Policy.¹³ Our assessment is consistent with the analysis detailed in the Staff's findings and the testimony of Mr. O'Brien and Mr. Luehman.

Respectfully submitted,

/RA/

Lisa B. Clark
Shahram Ghasemian
Kimberly A. Sexton

dated at Rockville, MD
this 5th day of February, 2009

¹³ *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-04-24, 60 N.R.C. 160, 218, fn.176 (2004).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO MR. GEISEN'S POST-TRIAL BRIEF WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 5th day of February, 2009.

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