No. 08-3655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

DAVID GEISEN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio (Toledo)
(No. 3:06-cr-00712-DAK)

ANSWERING BRIEF FOR THE UNITED STATES

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Division

THOMAS T. BALLANTINE
KATHERINE J. BARTON
JOHN L. SMELTZER
Attorneys, Department of Justice
Post Office Box 23795
Washington, DC 20026-3795
(202) 305-0343

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES, RULES & REGULATIONS:

ABBREVIATIONS

BACCP	Boric Acid Corrosion Control Procedures
B&W	Blake and Wilcox
CRDM	control rod drive mechanism
EFPY	effective full power years
FENOC	FirstEnergy Nuclear Operating Company
LOCA	Loss of Coolant Accident
NRC	Nuclear Regulatory Commission
RFO	refueling outage
ROA	record on appeal
SIA	Structural Integrity Associates

STATEMENT REGARDING ORAL ARGUMENT

Given the extensive record on appeal, the United States submits that oral argument might assist this Court in resolving the Defendant's principal claim regarding the alleged insufficiency of evidence. The United States is prepared to present oral argument and, pursuant to Circuit Rule 34(a), seeks the opportunity to do so, should this Court determine that oral argument will assist its decisional process. *See* Circuit Rule 34(j).

STATEMENT OF JURISDICTION

This is a criminal prosecution against the Defendant David Geisen ("Geisen") for making false statements and concealing material facts in a matter within the jurisdiction of the Nuclear Regulatory Commission ("NRC"), all in violation of 18 U.S.C. § 1001. The district court had jurisdiction under 18 U.S.C. § 3231. A jury found Geisen guilty on Counts 1, 3, and 4 of a five-count indictment. (ROA[1/] 633, *Verdict Form*). The district court sentenced Geisen on May 1, 2008. (ROA 780, *Judgment*). Geisen timely appealed on May 8, 2008. (ROA 785-86, *Notice of Appeal*); Fed. R. App. P. 4(b)(1)(A)(i). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to show that Geisen acted "knowingly and willfully" with respect to the material omissions and false statements charged in the indictment;
2. Whether the trial court properly gave a "deliberate ignorance" instruction with respect to Geisen's knowledge; and
3. Whether the trial court properly excluded evidence regarding the Government's offer of a deferred-prosecution agreement.

[1/] "ROA" citations are to the page number(s) in the record on appeal compiled by this Court.

STATEMENT OF THE CASE

A. Nature of the Case

In early 2001, a large circumferential crack was discovered on a reactor vessel head nozzle at a nuclear power station in South Carolina. This discovery raised significant questions about the safety of similar reactors across the nation and the adequacy of the existing inspection protocol for those reactors, causing the NRC to send a bulletin to affected licensees, requesting information about previous inspections and whether the plants should be shut down for more rigorous inspection. The defendant David Geisen was one of several managers responsible for coordinating the response of FirstEnergy Nuclear Operating Company ("FENOC") in relation to the Davis-Besse Nuclear Power Station ("Davis-Besse") in northwest Ohio near Toledo.

At the time of the NRC bulletin, FENOC did not have inspection data sufficient to demonstrate the absence of nozzle cracking. However, an unscheduled outage would have had severe impacts on operations and operational costs. Accordingly, Geisen approved written responses and gave oral presentations to the NRC that misrepresented the comprehensiveness of inspection data and concealed substantial impediments to previous visual inspections, all to persuade NRC to permit Davis-Besse to operate until the next scheduled refueling

outage. Based in part on the false representations, the NRC permitted Davis-Besse to continue operating until February 2002. During that outage, FENOC discovered five cracked nozzles and, adjacent to one of the cracked nozzles, a five-by-seven inch corrosion cavity that had worked its way through the six-inch reactor vessel head, leaving only a thin layer of stainless-steel cladding.

Following an investigation, the United States sought and obtained an indictment against Geisen and two other FENOC employees for making false statements and concealing material information from the NRC, in violation of 18 U.S.C. § 1001. A jury convicted Geisen on three counts. In this appeal, Geisen argues that the evidence was insufficient to prove that he acted knowingly and willfully, that the trial court erred in giving an instruction on deliberate ignorance, and that the trial court erred in excluding evidence that Geisen rejected a deferred prosecution agreement. For the reasons stated *infra*, Geisen's objections lack merit and his convictions should be affirmed.

B. Course of Proceedings

1. Indictment and Trial

On January 19, 2006, a grand jury for the Northern District of Ohio returned a five-count indictment against Geisen, Andrew Siemaszko, and Rodney Cook, charging violations of 18 U.S.C. § 1001. (ROA 24-37, *Indictment*). All five

counts alleged that the defendants concealed material information and/or made materially false statements, in response to an NRC information request. *Id.* Count 1 alleged that the defendants "knowingly and willfully conceal[ed] and cover[ed] up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the [NRC]," through a series of written and oral statements and omissions between September 4, 2001and February 16, 2002. (*Id.* at 29-33.) Counts 2 through 5 charged false statements in individual "serial letters" (formal correspondence with the NRC) submitted in response to the bulletin. (*Id.* at 33-37). The relevant serial letters and other statements are described *infra* (pp. 23-34).

On March 9, 2007, the trial court granted Geisen and Cook's motion to sever their trial from that of co-defendant Siemaszko. (ROA 281-85, *Order*). Trial of Geisen and Cook began on October 1, 2007, (ROA 551, *Minute Entry*). The presentation of evidence continued through October 23, 2007. (ROA 619, *Minute Entry*).

2. Motion in Limine

Just prior to trial, Geisen moved *in limine* for permission to introduce evidence that Geisen rejected a deferred prosecution agreement offered by the Government. (ROA 469-72, *Motion*). The court deferred ruling. (Tr. I/RE264, p.

3).[2/] During the Government's case in chief, the Government called one witness who testified that he had entered a deferred prosecution agreement. (Tr. VII/RE259, pp. 1152-53, Prasoon Goyal). Three other prosecution witnesses testified that they had been "targets" of the investigation and/or had provided information under a "proffer" letter, but were testifying without an agreement with the Government. (Tr. III/RE257, p. 376, Dale Miller; Tr. VII/RE259, pp. 1260-62, Steve Moffitt; Tr. VII/RE259, 1335-1336, Dale Wuokko). Based in part on such testimony, Geisen renewed his motion to present evidence that he had rejected a deferred-prosecution agreement. (Tr. X/RE268, pp. 1811-13). The court denied the motion from the bench, stating, *inter alia*, that there were "too many factors and variables" that went into Geisen's decision to reject the agreement to make that decision probative of his state of mind during the offense conduct. (*Id.* at 1815-16).

3. Verdict and Post-Trial Motions

The court gave final instructions and submitted the case to the jury on October 23, 2007. (ROA 619, *Minute Entry*). The jury reached its verdict on October 30, 2007, finding Geisen guilty on counts 1, 3 and 4 and not guilty on

[2/] "Tr." citations are to the trial transcript, by volume and district court record entry ("RE") number; *e.g.*, Tr. I/RE264 is transcript volume I, RE 264.

counts 2 and 5. (ROA 625, *Minute Entry*). The jury acquitted Cook on all charges. *Id.*

Geisen subsequently filed a motion for judgment of acquittal or, alternatively, for a new trial, arguing, *inter alia*, that the evidence was insufficient to show his knowledge and intent and that the deliberate ignorance instruction was improper. (ROA 637-674, *Motion*). The court denied the motion by order dated April 22, 2008. ROA 729-31 (*Order*).

4. Sentencing

On May 1, 2008, the court sentenced Geisen to serve a term of three-years probation, to pay a fine of $7,500, and to pay a special assessment of $300. (ROA 780-84, *Judgment*). The court directed, as a special condition of probation, that Geisen be barred during the probationary period from employment with the nuclear power industry. (*Id.* at 782.)

STATEMENT OF FACTS

A. Background

1. Regulatory Requirements

Nuclear power plants are regulated by the NRC under the Atomic Energy Act, 42 U.S.C. § 2011 *et. seq.*. All plants must be licensed and must operate in accord with licensing conditions. 42 U.S.C. § 2131; 10 C.F.R. § 50.10; *see also*

42 U.S.C. § 2133 (commercial licenses). A standard condition of all licenses requires licensees to "submit . . . written statements, signed under oath or affirmation," whenever NRC requests information to determine whether a license should be modified, suspended, or revoked. 10 C.F.R. § 50.54(f). NRC regulations further state that all "[i]nformation provided to the Commission . . . by a licensee . . . shall be complete and accurate in all material respects." 10 C.F.R. § 50.9(a).

2. Davis-Besse Reactor

The Davis-Besse Nuclear Power Station is a two-loop pressurized water reactor designed by Babcock and Wilcox ("B&W"). (Apx. XI:813, Gov. Ex. 132; Apx. XII:839, Gov. Ex. 158).[3/] The reactor vessel is a large cylindrical chamber filled with "coolant" water, pressurized to approximately 2,000 pounds per square inch. (Tr. IV/RE265, pp. 521-31, Holmberg; Apx. XI:812, Gov Ex. 131). Uranium-235 rods at the core of the vessel fuel a nuclear reaction that heats the coolant water. (Tr. IV/RE265, pp. 530-31, Holmberg). Boric acid is added to the coolant to help control the nuclear reaction. *Id.* at 525. The heated coolant is

[3/] "Apx." citations are to the Appendix of trial exhibits filed with Geisen's brief (volumes 1-8) and the Government's brief (volumes 9-11); *e.g.*, Apx. X:813 is Appendix Vol. X, p. 813.

cycled out of the reactor to heat water in a "secondary" loop, which connects to steam turbines that generate electricity. (*Id.* at 524; Apx. XI:813, Gov. Ex. 132).

At the top of the Davis-Besse reactor vessel is a domed lid or "head" approximately ten feet in diameter. (Apx. XII:839, Gov. Ex. 158). There are sixty-nine penetration nozzles (tubes four inches in diameter and several feet long) that protrude through the head. *Id.* During manufacture, the nozzles are super-cooled, inserted into pre-bored holes, then allowed to expand to form an "interference fit." (Tr. III/RE257, pp. 277-78, Hiser). The nozzles are also welded in place with a "J-groove" weld on the underside of the vessel head. (Apx. XII:839, Gov. Ex. 158). Above the head, the nozzles attach to control rod drive mechanisms ("CRDMs") that enable operators to lower control rods into the reactor vessel to stop or control the rate of the nuclear reaction. (Tr. IV/RE265, pp. 527-29, Holmberg).

Davis-Besse operates on a two-year fuel cycle, shutting down every two years for refueling. (Tr. VII/RE259, p. 1224, Moffitt). The refueling outages ("RFOs") are numbered for reference – *e.g.*, the tenth refueling outage was "RFO 10" – and provide the principal opportunity for inspections, maintenance, and repairs that cannot be performed during operations. (Tr. II/RE256, p. 198, Tabbert).

3. Geisen's Position

Geisen began working for FENOC at Davis-Besse in 1988. (Tr. X/RE268, p. 1820, Geisen). In 1996, he became a senior reactor operator (*id.* at 1821); in March 2000, he became Design Basis Engineering Manager. (*Id.* at 1823). In the latter role, Geisen was responsible for plant design, including implementing any necessary modifications or repairs during RFOs. (*Id.* at 1824-26). Geisen was also a member of the Corrective Action Review Board, (*id.* at 1823), which reviewed condition reports and determined corrective actions to be taken. (Tr. V/RE258, p. 873, Goyal). Geisen supervised five management groups and approximately 30 engineers. (Tr. X/RE268, p. 1825, Geisen). Geisen reported to Steven Moffitt, Director of Technical Services who reported to Guy Campbell, site vice president and head of the plant. (Tr. VII/RE 259, pp. 1198-99, 1203, Moffitt).

B. Vessel-Head Maintenance

1. Stress Cracking

In the early 1990s, the nuclear power industry discovered that the nozzles of pressurized water reactors are susceptible to "stress corrosion cracking." (Tr. II/RE256, p. 111-12, Sheron). At several plants, small axial (lengthwise) cracks were found on the nozzles and welds on the underside of the reactor vessel heads.

(*Id.*). In consultation with industry, the NRC determined that such cracks posed a concern but not an imminent safety threat. (*Id.* at 111-13; Tr. IV/RE265, pp. 536, 540-1, Holmberg).

Reactor vessel heads are manufactured from carbon steel and are more than six inches thick. (Apx. XII:841, Gov. Ex. 158). The underside of the head (which contacts the coolant) is clad with non-corrodible stainless steel. (Tr. V/RE258, p. 725, Davis). The nozzles and J-groove welds are also manufactured from a non-corrodible alloy. (*Id.* at 724). The NRC determined that stress cracking in the nozzles and welds could result in the leakage of coolant through the nozzle penetration into the containment structure surrounding the reactors. (Tr. IV/RE265, p. 533-36, Holmberg). However, the NRC believed that the cracks would be identified by substantial leakage before posing a threat to the structural integrity of the reactor head and possibility of catastrophic failure. (*Id.* at 536). When coolant escapes a reactor or contacts the extremely hot vessel head, the water tends to flash to steam, leaving behind boric acid deposits. (Tr. III/RE257, p. 239, Hiser). This provides a telltale sign of nozzle cracking; *viz.*, boric acid deposits in the vicinity of a leak on the surface of the head. (Tr. IV/RE265, p. 536, Holmberg).

In 1997, NRC issued a "generic letter" advising licensees to develop programs for the periodic inspection of vessel head penetrations to monitor for stress cracking. (Tr. II/RE256, p.113, Sheron). The NRC did not, however, mandate any specific inspection protocol. *Id.* During RFOs in 1996, 1998, and 2000, Davis-Besse conducted visual inspections of the reactor vessel head that were impeded in two significant ways.

2. Restricted Access

First, the Davis-Besse reactor vessel head was not accessible to direct visual examination. Directly above the head is a horizontal layer of metal-reflective

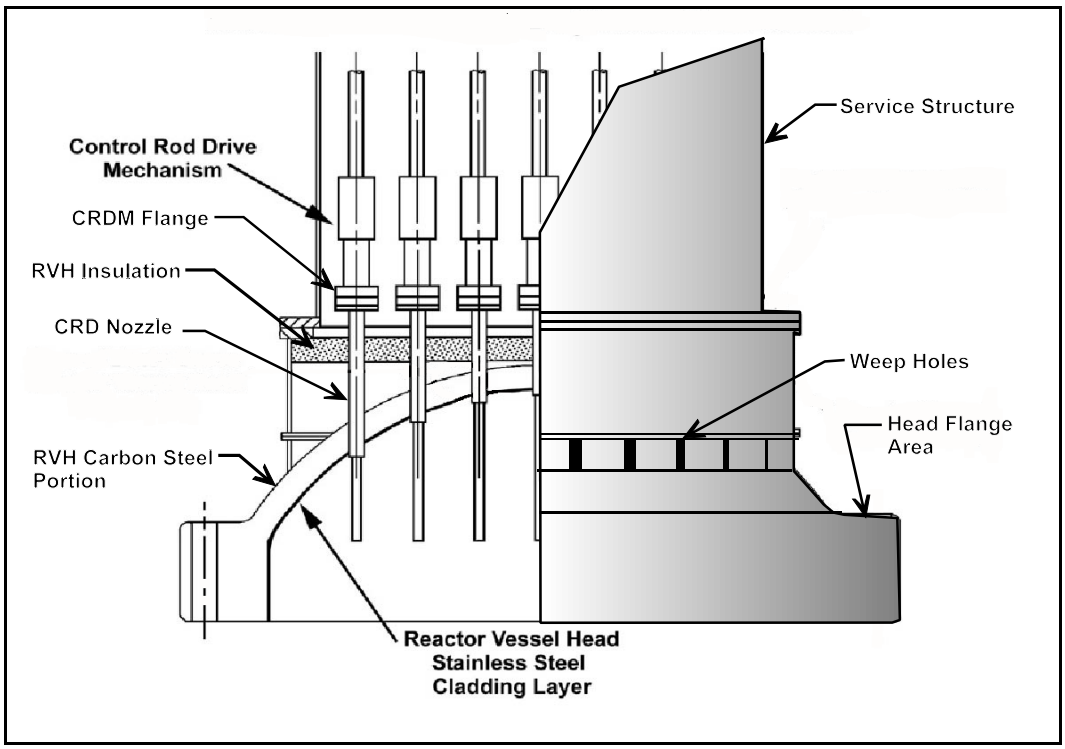

Figure 1: Reactor Vessel Head, Cross-Sectional View, Apx XI:816, Gov. Ex. 137

"mirror" insulation that protects the CRDMs from the heat of the reactor vessel. (Apx. V:404, Gov. Ex. 60, Apx. XI:816, Gov. Ex. 137 (figure 1)). The CRDMs, insulation, and vessel head are enclosed within a service structure that covers the head like a hat. (*Id.*). At the time of the conduct in this case, the only way to access the surface of the vessel head – for inspection or cleaning – was through 18 approximately five-by-seven inch rectangular "weep holes" at the bottom of the service structure. (Tr. IV/RE265, p. 543, Holmberg; Tr. VI/RE266, p. 927, Goyal). Davis-Besse personnel could view the vessel head only through video broadcasts from pole-mounted cameras inserted through the weep holes. (Tr. V/RE258, p. 881, Goyal). Greg Gibbs, a former Davis-Besse director of engineering, described such access as "severely restricted." (Tr. V/RE258, p. 837, Gibbs).

3. Boric-Acid Deposits

Second, Davis-Besse had a history of flange leaks that had the potential to mask leaks from nozzle cracking. Because the flanges are above the mirror insulation – where the nozzles connect to the CRDMs, (Apx. XI:815-16, Gov. Ex. 136-37; Apx. XII:839, Gov. Ex. 158) – boric acid deposits from flank leaks will settle first on top of the mirror insulation. However, such deposits can reach the reactor vessel head through gaps in the insulation where the nozzles protrude. (Tr. III/RE257, pp. 239-240, Hiser). If significant deposits from flange leaks reach the

reactor vessel head, they can cover the nozzle penetrations and hide or obscure deposits from nozzle cracks. (*Id.* at 248).

As explained *infra,* during inspections in 1996, 1998, and 2000, Davis-Besse encountered increasing amounts of boric-acid deposits below the mirror insulation and on the reactor vessel head. In retrospect, a large part of these deposits likely resulted from the developing nozzle cracks and cavity discovered in RFO 13 (p. 34-35, *infra*), rather than from flange leaks.[4/] (Tr. IV/RE265, pp. 668-69 & Tr. V/RE258, pp. 712-720, Davis). At the time, however – based in part on prior experience – Davis-Besse attributed the deposits solely to flange leaks. (Apx. IX:614, Gov. Ex. 9; Apx. IX:618, Gov. Ex. 12; Tr. VII/RE259, pp. 1202-03, 1207, Moffitt.) Whatever their origin, there is no dispute that the deposits impeded inspection and the interpretation of inspection results.

[4/]By 1996, Davis-Besse had completely replaced faulty gaskets identified as the source of chronic flange leaks. (Tr. VIII/RE260, pp. 1432-1444, Chimahusky). Edward Chimahusky, a Davis-Besse engineer who participated in flange inspections before and after 1996, testified that the gasket repairs appeared to solve the flange-leakage problem. (*Id.* at 1439-40, 1443). On the other hand, a defense expert opined that one flange (D-10) could have leaked "precipitously" prior to the 2000 outage and deposited a "great deal" of boric acid on the mirror insulation and reactor vessel head. (Tr. X/RE268, pp. 1747, Bullen).

C. Vessel Head Inspections and Cleaning

1. 1996 Inspection (RFO 10)

During RFO 10 in 1996, an "as found" (pre-cleaning) inspection of the reactor vessel head was performed by FENOC engineer Prasoon Goyal. (Tr. V/RE258, p. 878, Goyal). Goyal was assisted by two technicians, one with a light and the other with a camera, each mounted on a "sturdy wire" approximately three feet long. *Id.* at 881. Goyal sat at a video monitor adjacent to the reactor head and directed the technicians in the movement of the camera through the weep holes. *Id.* at 881-882. Goyal videotaped the entire inspection, while directing the camera and narrating the location of the camera based on "stud" numbers called out by the technicians (*i.e.*, numbers at stud holes adjacent to the weep holes). *Id.* at 881; Tr. VI/RE266, p. 1093; Apx. XII:882, Def. Ex. 29).

Goyal testified that he could not inspect the entire vessel head, for two reasons. (Tr. VI/RE266, p. 928, Goyal). First, the inspection was restricted to one hour, to limit worker radiation exposure. (*Id.*; Tr. V/RE258, p. 880). Second, the nozzles toward the center of the head could not be reached from the weep holes at the bottom of the service structure. (Tr. VI/RE266, 928-29, 944-45; Tr. vol VII/RE259, pp.1179-80.) At the top of the dome, the gap between the vessel head and insulation narrows to two inches. (Apx. XII:839, Gov. Ex. 158). Given this

tight space, the distance to the top of the head, and the limited reach of the camera pole, it was difficult (if not impossible) to view nozzles high on the head, especially if there was debris in the pathway. (Tr. vol VII/1179-80, Goyal; *see also* Tr. IV/RE258, p. 612, Holmberg). Given these limitations, Goyal estimated that only 50 to 60 percent of the vessel head was viewed. (Tr. VI/RE266, p. 928; Apx. II:201, Gov. Ex. 5).

The Government introduced the 1996 inspection videotape at trial and played portions for the jury. (Tr. III/RE257, p. 300, Hiser). The video shows boric acid deposits scattered across the head, including several large debris piles. (*Id.* 300-304.)

Following the inspection, Goyal initiated a "Potential Condition Adverse to Quality Report," a form used to document conditions that warrant corrective action. (Tr. V/RE258, pp. 884-86; Apx. II:191, Gov. Ex. 5). Goyal observed that the company's Boric Acid Corrosion Control Procedure ("BACCP") required the inspector to estimate the extent of corrosion on the reactor head as a result of boric acid deposits (*e.g.*, from flange leaks) and determine whether deposits had spread to internal components (non-visible areas). (Apx. II:192, 195, Gov. Ex. 5). Given the "lack of removal of boron deposits . . . after each operating cycle" – due, in part, to the inability of Davis-Besse personnel to access the entire reactor head for

inspection and cleaning – Goyal reported that it was impossible to "fully implement[]" the BACCP, (*id.* at 202), and "difficult to draw any conclusion from the inspection." (*Id.* at 196-197). Among other things, Goyal noted that the presence of deposits from flange leaks made it "difficult to distinguish" whether deposits resulted from flange leaks or cracks at the nozzle penetrations. (*Id.* at 194-95; Tr. VI/RE266, pp. 950-951, Goyal).

Goyal's report initiated a management review of possible corrective action. (Tr. VI/RE266, pp. 933-39, 949-51, Goyal). Goyal testified that other B&W plants had installed doors on their service structures that could be opened during outages to permit inspection and cleaning. (*Id.* at 930). FENOC engineers had earlier proposed and ultimately approved the same modification for Davis-Besse, (*id.* at 942), but implementation was deferred. (*Id.* at 962, Goyal; Apx. XII:823, Gov. Ex. 149 at 6). In September 2000 – with Geisen as an "Attending Committee Member" – Davis-Besse's "Project Review Committee" further deferred the modification until RFO 14. (Tr. VI/RE266, p. 969; Tr. XI/RE261, p. 1953, Geisen; Apx. IX:639, 644, Gov. Ex. 21).

2. 1998 Inspection (RFO 11)

During RFO 11 in 1998, the "as found" inspection was conducted by FENOC employee Pete Mainhardt. (Tr. VI/RE266, p. 955, Goyal). The

Government introduced videotape of the inspection, (Tr. IV/RE265, pp. 548, 604-608, Holmberg), and Mainhardt's condition report (Apx. IX:612-15, Gov. Ex. 9), which reported uneven boric acid deposits scattered across the reactor vessel head and several fist sized clumps. (*Id.*; Tr. VI/RE266, pp. 957-59). As before, the 1998 video inspection missed a substantial number of nozzles high on the reactor vessel head. (Tr. IV/RE265, pp. 551, 612, Holmberg).

3. 2000 Inspection (RFO 12)

During RFO 12 in 2000, the vessel head inspection was performed by Siemaszko and others. (Tr. XI/RE261, p. 1911, Geisen). The inspection videos showed considerably greater boric acid deposits on the vessel head. (Tr. IV/RE265, p. 609, Holmberg). Rust-stained boric acid deposits flowed like lava out of several of the weep holes, preventing camera access through those holes. (Apx. IX:632, Gov. Ex. 15; Apx. XI:817, Gov. Ex. 143; Tr. II/RE256, pp. 179-180, Tabbert.) The camera encountered similar mounds of debris on the reactor head (Tr. IV/RE265, pp. 610-661, Holmberg), and at one point during the inspection, "appeared to bury itself in boric acid deposits." (*Id.* at 611). Due to such conditions, the 2000 inspection covered an even smaller percentage of the vessel head than the prior two inspections. (*Id.* at 551, 612).

Siemaszko prepared a condition report describing the "large" "lava like" deposits on the reactor head, and designating the condition a "mode . . . restraint" (Apx. IX:630-632, Gov. Ex. 15), *i.e.*, a condition requiring corrective action before the reactor could be returned to operation. Siemaszko referenced the NRC's 1997 Generic Letter and the need for the vessel head to be "free of boron deposits" to provide a baseline for nozzle inspections. (*Id.* at 633). On April 27, 2000, Geisen signed an addendum to the report removing the mode restraint. (*Id.* at 636; *see also* Tr. XI/RE261, p. 1947, Geisen). In so doing, Geisen cited the fact that the head was scheduled to be cleaned. (*Id.*)

Terry Tabbert was a member of teams assigned to perform the 2000 vessel-head cleaning. Tabbert testified that, during prior outages, the crew had used vacuum hoses to remove dust-like deposits from the vessel head, but that vacuums were useless in 2000. (Tr. II/RE256, p. 175-76). Tabbert described the deposits in 2000 as "hard" and wedged between the nozzles. (*Id.* at 176-77). The crew sprayed hot water up through the weep holes to try to dissolve the deposits and used iron "spud bars" to break the deposits loose. (*Id.* at 178). Tabbert testified that they cleared away as much debris as possible, but that boric acid deposits remained at the conclusion of the cleaning. (*Id.* at 190).

D. Bulletin 2001-001

1. Discovery of Circumferential Cracking

In early 2001, operators of the Oconee Nuclear Station ("Oconee") in South Carolina discovered small "popcorn"-like boric acid deposits at the nozzle penetrations on Oconee Units 2 and 3. (Tr. III/RE257, p. 242, Hiser; Apx. III:246-248, Gov. Ex. 29). In November 2000, similar deposits at Oconee Unit 1 had been traced to axial (lengthwise) cracking. (Apx. III:246, Gov. Ex. 29). At Units 2 and 3, however, the deposits were traced to circumferential cracks (cracks wrapping around the nozzle), including, at Oconee 3, a large through-wall crack that extended 165 degrees around one nozzle above the J-groove weld and thus within the vessel head's "pressure boundary." *Id.* at 247.

The Oconee findings caused NRC to reassess its determination that stress cracking was not an immediate safety concern. *Id.* at 249. While below-weld axial cracks are relatively benign, a circumferential crack above the J-weld could propagate to a point where the pressure inside the reactor could "physically blow the [affected nozzle] out of the reactor head," (Tr. II/RE256, pp. 114-15, Sheron), and cause a "loss of coolant accident" ("LOCA") or "meltdown." (Tr. III/RE257, p. 291-93, Hiser; Apx. III:251, Gov. Ex. 29). Further, the cracks at Oconee were identified by very small boric acid deposits, less than one cubic inch. (Apx.

III:247, 251, Gov. Ex. 29); Tr. III/RE257, p. 242). This belied expectations that greater leakage (and boric acid deposits) would precede any serious cracking and highlighting the need for more precise inspection. (Apx. III:251, Gov. Ex. 29).

On August 3, 2001, the NRC sent NRC Bulletin 2001-001, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" to affected licensees. (*Id.* at 246-61). The bulletin advised that plants with a "high susceptibility" to stress corrosion cracking "need[ed] to use a qualified visual examination of 100% of the . . . nozzles," (*id.* at 253), and that "the effectiveness of [such] examination should not be compromised by the presence of insulation, existing deposits on the [reactor vessel] head, or other factors that could interfere with the detection of leakage." (*Id.*) Davis-Besse's effective full power years ("EFPY") of operation were within five EFPY of Oconee Unit 3 (Apx. V:388, Gov. Ex. 60), making Davis-Besse a "high susceptibility" plant. (Apx. III:253, Gov. Ex. 29).

2. Early Response at Davis-Besse

Geisen and others at Davis-Besse learned of the findings at Oconee well before the NRC bulletin. FENOC is a member of the B&W Owners' Group, an industry group organized to address issues common to B&W plants. Geisen was Davis-Besse's representative to the Owners' Group Steering Committee, which

established priorities for group projects. (Tr. X/RE268, pp.1836-37, Geisen). In October 2002, Geisen told NRC investigators that he got involved with nozzle cracking issues in late 2000, when cracks at Oconee were first discovered. (Tr. IX/RE267, pp. 1501, 1504, Ulie).

Among other things, Geisen received reports from Goyal, a member of the Owners' Group Materials Committee. (Tr. V/RE258, p. 868, Tr. VI/RE266, pp. 977-79, 983-990, Goyal). In December 2000, Goyal forwarded an email to Geisen and others, noting that "the amount of boric acid observed in the visual inspection [at Oconee Unit 1] was very small and that it is important to have a clean head for a good visual inspection." (Apx. III:227, Gov. Ex. 22). Similarly, in January 2001, Goyal distributed a Materials Committee meeting report ("trip report") to Geisen and others, emphasizing that "head cleaning during outages should be a top priority" and that "inspection openings should be added to service structures." (Apx. III:228-230, Gov. Ex. 23). In March 2001, after the large circumferential crack was discovered at Oconee Unit 3, Goyal sent an email to Geisen and others, reporting that five Davis-Besse nozzles (numbers 1-5) were manufactured from the same "heat" as all of the cracked nozzles at Oconee Unit 3. Apx. III:231 (Gov. Ex. 25).

In June 2001, in response to the Oconee findings, Geisen signed and "approved" a memorandum – prepared by Goyal – concluding that an inspection for evidence of nozzle cracking at Davis-Besse could be "deferred" until RFO 13 (scheduled for April 2002). (Apx. III:232-239, Gov. Ex. 26). While acknowledging that "[l]arge boron leakage from a CRDM flange" prevented "detailed inspection of the CRDM nozzles" during the previous outage, (*id.* at 233, 237), the memo determined that, compared to Oconee, Davis-Besse had a "susceptibility ranking" of 2.5 years, "mean[ing] that it would take approximately 2.5 additional years of operation for Davis-Besse to observe the same degradation as noted at . . . Oconee 3." (*Id.* at 234, 238). Given this "simplified susceptibility ranking," the memo "anticipated" that "[n]o catastrophic failure" would result from "delaying the head inspection from now to 13RFO." (*Id.* at 234). Goyal testified that senior managers instructed him to prepare the memorandum as a justification for not conducting a vessel head inspection, in the event the plant needed to shut down for any unrelated reason before RFO 13.[5/] (Tr. VI/RE266, pp. 994-995, Goyal).

[5/]Whenever a reactor is shut down (*e.g.*, due to a weather event), any outstanding "mode restraint" (condition requiring inspection or repair) would prevent a return to operation, even if not the cause of the outage. (Tr. VII/RE259, pp. 1208-09, Goyal).

3. Information Request

Approximately one month later, the NRC issued Bulletin 2001-011. The bulletin required all affected licensees to submit, *inter alia*: (1) a "description of [their] [reactor] head insulation type and configuration, (2) a "description of the . . . nozzle and . . . head inspections . . . performed . . . in the past 4 years, . . . [i]nclud[ing] a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the . . . head for visual examination," and (3) if the licensee did not intend to schedule an outage for inspection before December 31, 2001, a "basis for concluding" that regulatory requirements – including the design criteria prohibiting "cracked and leaking . . . nozzles" – would be met through the next scheduled outage. (Apx. III:254-56, Gov. Ex. 29).

E. Response to Bulletin 2001-001

FENOC submitted several serial letters in response to the NRC bulletin, with "green sheets" containing the signatures of personnel who reviewed and approved the submissions. (Apx. IV:379-384, V:385-410, 414-431, VI:432-VIII:611, X:710-711, XI:712-729, Gov. Ex. 59-60, 104-105, 110-115). Rod Cook, a consultant retained by FENOC, prepared the letters with information from Davis-Besse personnel. (Tr. VIII/RE260, pp. 1480-81, Ulie). Geisen signed each of the green sheets, (Apx. IV:383, V:414, VII:527, IX:708, IX:710, Gov. Ex. 59, 104,

110, 112, 114), and became FENOC's principal spokesperson on matters relating to prior inspection of the vessel head.

1. Serial Letter 2731

FENOC submitted its initial bulletin response – Serial Letter 2731 – on September 4, 2001. (Apx. V:385-410, Gov. Ex. 60). With regard to insulation configuration, the letter acknowledged that there was "metal reflective insulation" above the Davis-Besse reactor vessel head, with "a minimum gap . . . at the dome center . . . [of] approximately 2 inches" and that inspections were "performed by the use of a small camera . . . inserted through . . . weep holes." (*Id.* at 389.) The letter added, however, that the insulation "does not impede a qualified visual inspection" and "does not interfere with the visual inspection." (*Id.*)

With respect to past inspections, Serial Letter 2731 reported that FENOC had conducted two inspections in the previous four years, which inspections revealed "an uneven lay of boric acid deposits scattered over the head" in 1998; and "*some accumulation* of boric acid deposits . . . beneath . . . leaking flanges" in 2000. (*Id.* at 389-390 (emphasis added)). The letter further reported that the "scope" of the inspections "was to inspect the *bare metal* RPV head area," that the inspections were performed "in accordance with" FENOC's BACCP, and that "no visible evidence of nozzle leakage was detected." (*Id.* at 389-90 (emphasis

added)). The letter stated that a review of 1998 and 2000 inspection videotapes confirmed that "indications . . . similar to [those] seen at [Oconee] . . . were not evident." (*Id.* at 390).

As to future inspections, the letter stated that the vessel head "was cleaned with demineralized water to the greatest extent possible . . . " (*Id.* at 390), and that a "qualified visual examination" would be performed during RFO 13 in April 2002 and would "not be compromised due to any pre-existing boric acid crystal deposits." (*Id.* at 391-392). Finally, as to Davis-Besse's ability to safely operate beyond December 2001 (without inspection), Serial Letter 2731 reported that Davis-Besse was "similar in design" to Oconee, that Oconee "demonstrated an ability to identify leaking CRDM nozzles by visual inspection," and that Davis-Besse "ha[d] not observed any leakage from [relevant] paths during its past inspection activities." (*Id.* at 393-394).

The letter did not report, *inter alia*: (1) the large amounts of boric acid flowing like "lava" on the reactor head and out of the weep holes in 2000; (2) the need to use spud bars to dislodge the boric acid deposits in 2000; (3) the boric acid deposits left on the vessel head after the 2000 inspection; or (4) the limited extent of the 1998 and 2000 inspections (*i.e.*, the fact that they were not comprehensive of all nozzles). (*Id.* at 389-394).

2. Potential Shutdown Order

Upon review, the NRC found Serial Letter 2731 to be incomplete and confusing, especially as to the extent of prior inspections. (Tr. II/RE256, p. 122, Sheron; Tr. III/RE257, pp. 233-34, Hiser). On September 28, 2001, Brian Sheron, then the NRC Associate Director in charge of bulletin responses, telephoned Guy Campbell (head of Davis-Besse) to report that Davis-Besse needed to provide "better justification for why they didn't believe they had cracking," or face a shutdown order in December. (Tr. II/RE256, p. 123, Sheron).

The prospect of shutting down in December 2001 became a matter of "great discussion" at Davis-Besse. Tr. VII/RE259, pp. 1222-1225 (Moffitt). According to Steven Moffitt (Geisen's supervisor), Campbell and the other managers had a "sense of confidence" in plant operations based on a "history of good reviews." (*Id.* at 1225). Moffitt testified that a premature outage would have been "quite severe" in its impact on fuel, costs, and employee morale, and that management "certainly wanted to span [the] operating cycle." (*Id.* at 1224-25; *see also* Tr. V/RE258, p. 822, Gibbs). In an interview with an NRC inspector during the investigation of this case, Geisen reported that Campbell was "very upset" by Sheron's call, which prompted "all sorts of new work activity" to meet NRC's concerns. (Tr. VIII/RE260, p. 1515, Ulie).

On October 3, 2001, Campbell initiated a conference call between Davis-Besse managers and NRC staff, to begin responding to NRC's concerns. (Tr. III/RE257, p. 246, Hiser; Tr. VII/RE259, 1227-28, Moffitt). During the call, Geisen represented that Davis-Besse inspected "100 percent . . . of the head," and that observations were impeded by boric acid deposits at only "five or six nozzles." (Tr. III/RE257, p. 247, Hiser; Tr. III/RE257, pp. 393-395, Miller; IX:656, Gov. Ex. 78).

On October 11, 2001, Geisen and other FENOC managers traveled to NRC's headquarters in Rockville, Maryland to provide a briefing (*via* slide presentation) to the Commission Technical Assistants. (Tr. III/RE257, pp. 249-251, Hiser; Apx. IX:660-677, Gov. Ex. 87; Apx. IX:678-681, Gov. Ex. 88.) Moffitt testified that either he or Geisen presented a "facts" slide, compiled by Geisen, which asserted that "[a]ll CDRM penetrations" on the Davis-Besse vessel reactor head "were verified to be free from 'popcorn' type boron deposits using video recordings from 11 RFO or 12 RFO." (Tr. VII/RE259, p. 1236; Apx. IX:667, Gov. Ex. 87; Apx. IX:678, Gov. Ex. 88).

According to Moffitt, Geisen later reported (after they returned to Ohio) that he had reviewed the details with his staff and determined that the "facts" slide was mistaken on one point; *viz.*, that the true "baseline" for the "100 percent

inspection" was RFO 10 in 1996 and not the later inspections. (Tr. VII/RE259, p. 1240, Moffitt). Moffitt testified that they decided to correct the error in upcoming submissions. (*Id.* at 1241.)

3. Serial Letter 2735

On October 17, 2001, FENOC submitted Serial Number 2735 for the stated purpose of providing "supplemental information" "in support of the basis for the continued safe operation" of Davis-Besse until RFO 13. (Apx. V:416, 419, Gov. Ex. 105). In the letter, FENOC expressly acknowledged, for the first time, that the 1998 and 2000 inspections were not comprehensive, stating that "50 of 69 nozzles" were viewed in 1998, and "45 of 69 nozzles" were viewed in 2000. (*Id.* at 420.) The letter reported that the unexamined nozzles could not be inspected because they were "obscured by boric acid crystal deposits." (*Id.* at 421.)

Serial Letter 2735 further reported, however, that the observed deposits "were clearly attributable to leaking . . . flanges from the center CRDMs," and that FENOC had conducted an earlier inspection – during RFO 10 in 1996 – that was not so impeded. (*Id.* at 420-421.) The letter stated that 1996 inspection covered "65 of 69 nozzles,"[6/] and that the three inspections together constituted "a whole

---

[6/]FENOC later reported that four nozzles were "excluded" because they did "not have sufficient interference gap" to permit leakage, thus rendering visual inspection of no value. (Apx. VIII:565, Gov. Ex. 113) (Serial Letter 2744).

head visual inspection . . . in accordance with the [BACCP]." (*Id.* at 420.) The letter then reiterated FENOC's prior conclusion (from Serial 2731) that a review of all inspection videos "did not identify any boric acid crystal deposits that would have been attributed to leakage from . . . nozzle penetrations." (*Id.* at 421.)

To support this conclusion, FENOC provided a table listing the results of the 1998 and 2000 inspections on a nozzle-by-nozzle basis. (*Id.* at 424-5.) For 1996, the table contained a footnote stating that "[in] 1996, the entire [reactor vessel] head was inspected," but that "each specific nozzle view could not be correlated" "[s]ince the video was void of head orientation narration." (*Id.* at 425.)

When interviewed during the NRC investigation in October 2002, Geisen stated that he directed Siemaszko to prepare the table and was responsible for reviewing Siemaszko's work. (Tr. IX/RE267 at 1515-1516, 1523, Ulie). Geisen also stated that he viewed relevant video clips with Siemaszko in early October 2001. (*Id.* at 1516.) In March 2002, Geisen told John Martin, an investigator retained by FENOC, that he "review[ed] the videos of the inspections while preparing for the NRC interactions in August 2001." (Apx. XII:831, Gov. Ex. 155; Tr. IV/RE265, pp. 482, 505-507, Martin).

NRC Reactor Inspector Melvin Holmberg later audited all inspection videos for purposes of the NRC's investigation. (Tr. IV/RE265, pp. 517, 542-553,

Holmberg). Holmberg testified that the 1996 video (contrary to FENOC's report) did not show all nozzles, was not "void" of head-orientation narration, and showed some nozzles buried in boric acid. (*Id.* at 658-659.) Overall, Holmberg's audit revealed: (1) that the total number of nozzles viewed on the videos were only 51 in 1996, 43 in 1998, and 23 in 2000; and (2) that, due to presence of boric acid deposits and limitations on camera angles, the total number of nozzles that could be verified leak free were only 28 in 1996, 18 in 1998 and 5 in 2000. (Tr. IV/RE265, p. 551; Apx. XI:803-810, Gov. Ex. 129).

In contrast, based on the purported whole-head inspection in April 1996, FENOC postulated – in Serial Number 2735 – that all 69 nozzles were leak-free prior to RFO 10, and that the earliest a crack could have developed (*e.g.*, in a nozzle not viewed in 1998 or 2000) was May 1996. (Apx. V:420-421, Gov. Ex. 105.) Assuming a "worst case" growth rate, FENOC asserted that it would take at least 7.5 years for a through-wall circumferential crack to grow beyond the "allowable" (safe) size, ensuring safe operation through 2003 (and thus beyond RFO 13). *Id.* at 421-22.

In Serial Number 2735, FENOC also reported that it had contracted with Structural Integrity Associates ("SIA") to perform a "finite element analysis" on the interference fit between the Davis-Besse nozzles and vessel reactor head. (*Id.*

at 422.) The analysis determined that sufficient gaps were present at 65 of the 69 nozzles to assure visible leakage if cracks developed.[7] (*Id.* at 422.) Although the analysis could not assure visible leakage from potential cracks in the remaining nozzles (numbers 1 to 4) , FENOC reported that these nozzles were in the center of the head, where no other licensee had reported circumferential cracking. (*Id.*; *see also* Apx. VII:533, 546-47, Gov. Ex. 111 (Serial Letter 2741) (excluding nozzles 1-4 as "not risk significant.")).

One week later, on October 24, 2001, FENOC managers presented a slide presentation at an NRC public meeting in Rockville. (Apx. IX:682-707, Gov. Ex. 108). Moffitt testified that Geisen compiled and presented the slides on past inspections. (Tr. VII/RE259, pp. 1247-50, Moffitt). The slides stated, *inter alia*, that "the inspection results afford us assurance that all but 4 nozzle penetrations were inspected in 1996" and that "no head penetration leakage was identified." (Apx. IX:693-694, Gov. Ex. 108).

4. Serial Letters 2741, 2744, and 2745

Between October 30 and November 1, 2001, FENOC submitted three additional serial letters to respond to questions from NRC staff. In addition to providing technical details, Serial Letter 2741 reiterated that inspections in 1996,

---

[7] Absent a leakage pathway, subsurface cracking cannot be detected *via* visual inspection of the vessel head. (Tr. III/RE257, pp. 247-48, Hiser).

1998, and 2000 constituted a "whole head visual inspection" of the "bare head" "in accordance with the [BACCP]." (Apx. VII:532, Gov. Ex. 111). Serial Letter 2745 similarly reiterated that during RFO 10 in 1996, "the entire head was visible so 100 percent of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head," which were "not expected to show leakage" per the SIA analysis. (Apx. X:718, Gov. Ex. 115).

In Serial Letter 2744, FENOC presented selected images from the 1996, 1998, and 2000 inspection videos. (Apx. VIII:559-606, Gov. Ex. 113). The introductory caption to the 1996 photos describes the photos as "representative" and states that the head was "relatively clean and afforded a generally good inspection." (*Id.* at 568.) Another 1996 photo shows a boric-acid pile at the top of the head and contains a caption stating that the pile "could not be removed by mechanical cleaning" due to "its location," but that the pile was "in the vicinity of previous leaking flanges" and was "*verified* to not be active or wet." (*Id.* at 570 (emphasis added)). The caption further states that "since these drives are not credited with leaking" (per the SIA report) "that further ratifies that the boron is from previous flange leakage." (*Id.*) Geisen told NRC investigators that he wrote the captions for the photos and obtained the information in the latter caption from Edward Chimahusky. (Tr. IX/RE267, pp. 1519, 1521 (Ulie)).

However, Chimahusky inspected the flanges (above the mirror insulation), not the reactor head. (Tr. VIII/RE260 at 1428-1442, Chimahusky). Further, Chimahusky testified that nobody at Davis-Besse asked him about his flange inspections in connection with the bulletin responses. (*Id.* at 1445). Goyal, who performed the 1996 vessel head inspection, testified that he was not asked about the inspection photos or captions, (Tr. VII/RE259, p. 1157, Goyal) and that he had told Siemaszko (during the bulletin review period) that he "did not inspect 100 percent of the nozzles." (Tr. VI/RE266, p. 1092, Goyal). Allen Hiser, the NRC regulatory branch chief responsible for reviewing bulletin responses, testified that the photos submitted in Serial Number 2744 did not show the large piles of boric acid, which NRC officials later observed when the videos were examined in the course of the NRC's investigation. (Tr. III/RE257, pp. 276-284, Hiser).

On the evening of November 8, 2001 – in advance of another public meeting with the NRC on Davis-Besse's bulletin response – Geisen met with NRC staff to show parts of the inspection videos. (*Id.* at 281-282, 300-304, 332). Hiser testified that Geisen showed parts of the 1996 video, for the purpose of confirming "generally . . . that the head was in good condition." (*Id.* at 303-04.) Geisen also presented some of the 1998 video, which showed more boric acid deposits on the head. (*Id.* at 304). Because the 2000 video showed even more boric acid, Geisen

remarked that he need not "bother" to show that video. (*Id.)* Although Hiser did not get the impression that Geisen was attempting to hide anything (*Id.* at 336), Hiser testified that Geisen did not show the 1996 video in its entirety and did not leave the videos with NRC. (*Id.* at 306, 336-337).

At trial, the Government played portions of the 1996 inspection videos for Hiser and the jury, including portions showing "large piles" of boric acid. (*Id.* at 300-303. Hiser testified that he did not recall seeing those images during the 2001 meeting, *id.*, and that, "in retrospect," Geisen showed the "good portions." (*Id.* at 281).

5. Final Representations

On November 28, 2001, FENOC managers traveled to Rockville to provide a final presentation before the NRC's decision on a potential shut down order. (Tr. II/RE256, pp. 125-126, Sheron; Tr. III/RE257, pp. 306, Hiser; Apx. X:730-756, Gov. Ex. 118). FENOC made several new commitments, including: (1) a commitment to advance the date of RFO 13 to February 16, 2002, and (2) a commitment to perform a "100% NDE [non-destructive examination]" (*e.g.*, ultrasonic testing) of the nozzle penetrations, in addition to a "100% qualified visual" examination, during the next outage. (*Id.* at 750, 753).

FENOC also repeated previous assurances. Geisen represented that "all but 4 nozzle penetrations were inspected in 1996" and that the "limiting nozzle population" were only "those nozzles that could not be inspected in 1998 or 2000." *Id.* at 731, 734. This echoed FENOC's earlier representation (in Serial Number 2744) that the only nozzles altogether "excluded" from the prior three inspections were nozzles 1-4, which, per the SIA analysis, were not expected to leak and thus not subject to visual examination. (Apx. VIII:565, Gov. Ex. 113). Two weeks earlier, on November 15, 2001, Davis-Besse employee Mark McLaughlin had sent Geisen an email with an updated SIA report demonstrating, contrary to SIA's initial report, that "all [69] nozzles will show a gap" and thus were subject to qualified visual examination. (Tr. IX/RE267, p. 1464, McLaughlin; Apx. XI:811, Gov. Ex. 130). Geisen did not disclose the new SIA report at the November 28, 2001 meeting with NRC. (Tr. III/RE257, p. 367, Hiser). One day later, however, Geisen presented the new information – internally – to FENOC's "Company Nuclear Review Board." (Apx. IX:787-788, Gov. Ex. 119).

F. Aftermath

On December 4, 2001, the NRC advised FENOC that the Commission would not order Davis-Besse to shut down for inspection. (Apx. XII:875, Def. Ex.

1). FENOC operated the plant until February 16, 2002, when the plant was shut down for refueling. (Apx. XII:840, Gov. Ex. 158). During the outage, FENOC conducted an ultrasonic examination, which revealed cracking at 5 nozzles (numbers 1, 2, 3, 5, and 47). (*Id.* at 840-841). During repair efforts, nozzle 3 unexpectedly tilted over onto a neighboring nozzle. (*Id.* at 840). The inspectors subsequently discovered – at the point where nozzle 3 toppled – a large corrosion cavity, approximately seven inches long, five inches wide, and six and a half inches deep. (*Id.* at 841; Apx. XI:814, Gov. Ex. 134; Tr. V/RE258, p. 740, Davis). Within this area, the carbon steel had completely degraded – representing a "loss of the design basis structural/pressure retention boundary" – leaving only the thin layer of cladding, which had "deflected upward" into the cavity. (Apx. XII:841, Gov. Ex. 158).

At trial, the Government presented expert testimony from Dr. James Davis, a materials engineer and member of an NRC "Augmented Inspection Team" that evaluated the degradation. (Tr. IV/RE258, pp. 666-67, Davis). Davis testified that the crack in nozzle 3 likely began around 1990 and would have left visible boron deposits on the reactor head by 1998 and possibly as early as 1996. Tr. IV/RE265, pp. 668-69, Tr. V/RE258, pp. 708-709). In contrast, the defense presented testimony from Dr. Daniel Bullen, a senior manager with "Exponent Failure

Analysis Associates," a company hired by FENOC to prepare a report in connection with the company's insurance claim. (Tr. X/RE268, pp. 1706, 1775-76, Bullen). Bullen opined that there was "very small leakage" from the cavity until mid-2001, and that the "vast majority of [the] subsurface . . . wastage cavity" was formed after October 2001. (*Id.* at 1770-1772).

G. Offer of Deferred Prosecution

Following investigation, prosecutors offered Geisen a "deferred prosecution agreement." Under the proposal, the Government would "refrain from seeking an indictment or otherwise initiating criminal prosecution of . . . Geisen" in relation to a stipulated set of facts, if Geisen would: (1) admit that he "knowingly and deliberately caused false representations to be made to the NRC," (2) agree to cooperate in criminal and administrative proceedings; (3) agree to waive the statute of limitations for any prosecution based on a breach of the agreement; and (4) agree that the stipulated facts could be used against him in any such prosecution or administrative proceedings. (ROA 473-79, *Motion in Limine*, Att. A). Through counsel, Geisen declined the offer.

H. Geisen's Testimony

At trial, Geisen took the stand in his own defense. (Tr. X/RE268, p. 1817-1902; Tr. XI/RE261, pp. 1903-2013). While admitting that he played a role in

presenting false and incomplete information to the NRC, (*id.* at 1986, 1995-96, 2000), Geisen denied contemporaneous knowledge of the falsifications and denied any intent to mislead. (*Id.* at 1818, 1843.) Particulars of Geisen's testimony are discussed at pp. 46-55, *infra.*

SUMMARY OF THE ARGUMENT

The record reveals a pattern a half truths, omissions, and misrepresentations by FENOC in response to the NRC bulletin, all designed to make Davis-Besse's previous inspections appear comprehensive, when Davis-Besse lacked inspection data for a substantial percentage of the nozzles on its vessel reactor head. The nature, extent, and duration of the misrepresentations – coupled with FENOC's admitted effort to persuade NRC to allow Davis-Besse to operate for just a few more months before inspection – demonstrate that the misrepresentations were not caused by inattention, inadvertence, or mistake. The only question is whether Geisen knowingly and willfully participated in the misrepresentations.

The evidence demonstrates that he did. At the time Geisen approved Davis-Besse's initial response – Serial 2731 – he was aware of the design impediments and boric-acid deposits that prevented Davis-Besse from conducting comprehensive inspections in 1998 and 2000, and aware that the impediments were not fully disclosed. Once the NRC raised questions about the letter and the

prospect of regulatory shutdown became real, Geisen became the principal spokesperson for FENOC on the past inspections, falsely assuring the NRC, in a conference call and a meeting, that the 1998 and 2000 inspections were comprehensive, despite the absence of data to back up that claim.

When NRC pressed for a nozzle-by-nozzle analysis, and Geisen realized the 1998 and 2000 inspections would not hold up, Geisen told Siemaszko to add the 1996 data. Geisen then repeatedly told the NRC that the 1996 inspection was comprehensive of the entire head, even though Goyal (who had performed the inspection) told Siemaszko that it was not comprehensive, and the inspection video itself revealed the limitations. During his trial testimony, Geisen admitted directing Siemaszko to construct the table, admitted reviewing video clips with Siemaszko, and admitted vouching for Siemaszko's work. Geisen also told a company investigator, that he had reviewed inspection videos as early as August 2001. Based on this and other evidence, a rational juror could have concluded, beyond a reasonable doubt, that Geisen knew, from discussions with Siemaszko and his own review of the videos, that the 1996 inspection, while more comprehensive that the two that followed, did not view the "entire head" or provide visible evidence of no leaking at 65 of 69 nozzles.

In addition, there was also sufficient evidence to demonstrate deliberate ignorance. Despite his role in compiling and presenting the data on the past inspections and supervising Siemaskzo's nozzle-by-nozzle analysis, Geisen testified, *inter alia*, that he never discussed with Siemaszko the single-most critical purported result of the nozzle-by-nozzle review; *viz.*, that the 1996 video was sufficient to enable qualified visual inspection of 65 of 69 nozzles. Given the many reasons Geisen had to doubt this result, a rational juror could have concluded, beyond a reasonable doubt, that Geisen deliberately disregarded the high probability of its falsity (if indeed he succeeded in avoiding specific knowledge of its falsity) when repeatedly presenting the data to the NRC.

The Government did not act inconsistently in seeking a deliberate ignorance instruction while also arguing a theory of actual knowledge. Where the evidence permits, the Government may pursue alternative theories of liability. Moreover, even if the deliberate ignorance instruction was not supported by the evidence, the giving of the instruction was at most harmless error, under this Court's precedent.

Finally, the trial court did not abuse its discretion, under Fed. R. Evid. 403, when excluding evidence that Geisen declined the Government's offer of deferred prosecution. Geisen's decision to decline the offer depended on a host of factors, including the conditions and consequences of the proposed deferred prosecution

agreement, and Geisen's understanding of the relative risks of indictment and conviction. Any evidence on these matters would have invited juror scrutiny of attorney-client communications, the likely penalty upon conviction, and the Government's rationale for making the offer, none of which are matters properly before the jury.

STANDARDS OF REVIEW

This Court reviews *de novo* the sufficiency of the evidence to sustain a conviction. *United States v. Gunter*, 551 F.3d 472, 479 (6th Cir. 2009). Evidence is sufficient if "after viewing the evidence in the light most favorable to the prosecution, and after giving the Government the benefit of all inferences that could reasonably be drawn from the testimony, any rational trier of fact could find the elements of the crime beyond a reasonable doubt." *United States v. M/G Transp. Servs., Inc.*, 173 F.3d 584, 589 (6th Cir.1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In examining claims of insufficiency, this Court does not "weigh the evidence presented, consider the credibility of witnesses, or substitute [its] judgment for that of the jury." *Id.* at 588-89.

This Court reviews a trial court's decision to exclude evidence for abuse of discretion. *United States v. Davis*, 490 F.3d 541, 546 (6th Cir. 2007). If this Court determines that the Court has improperly excluded evidence, this Court will

reverse for a new trial only if it finds that the evidence would have created a reasonable doubt as to the defendant's guilt. *United States v. Blackwell*, 459 F.3d 739, 757 (6th Cir. 200).

ARGUMENT

I. THE GOVERNMENT PROVED KNOWING AND WILLFUL CONDUCT

A false statement or omission in a matter before a federal agency constitutes an offense under 18 U.S.C. § 1001 when made "knowingly and willfully." 18 U.S.C. § 1001; *United States v. Dedman*, 527 F.3d 577, 598 (6th Cir. 2008). As the trial court instructed the jury, this means that the Government needed to prove, beyond a reasonable doubt, that Geisen acted "with knowledge that [the relevant representation] was false and with an intent to deceive." (Tr. XIII/RE262, p. 2334). *See also United States v. Brown*, 151 F.3d 476, 484 (6th Cir. 1998) (citing *United States v. Shah*, 44 F.3d 285, 289 (5th Cir.1995)).

Tracking Sixth Circuit Pattern Instruction 2.09, the trial court further advised the jury that:

> No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that [Geisen] deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements. But to find this, you must be convinced beyond a reasonable doubt that the defendant

> was aware of a high probability that the submissions and presentations to the NRC concealed material facts . . . or included false statements and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide.

(Tr. XIII/RE262, pp. 2338-39); *see also United States v. Lee*, 991 F.2d 343, 351 (6th Cir.1993) (approving instruction).

In this appeal, Geisen does not challenge the trial court's *mens rea* instructions. Nor does Geisen challenge the trial court's articulation of the law of deliberate ignorance. Rather, Geisen contends: (1) that the evidence was insufficient to support his conviction on any theory of knowledge (*see Brief* at 42-48); and (2) that, even if there was sufficient evidence to establish actual knowledge, the trial court committed reversible error by giving the deliberate ignorance instruction (*see Brief* at 47-56). For the reasons stated below and in Part II, *infra*, Geisen's arguments lack merit.

A. The Evidence Demonstrated Knowledge

1. Geisen Knew of the Misrepresentations in Serial 2731

NRC Bulletin 2001-001 presented FENOC (and Geisen) with an ultimatum: prove that nozzle cracking, like that discovered at Oconee, was not a concern at Davis-Besse or shut down before the end of the year for inspection. Apx. III:254-56 (Gov. Ex. 29). The bulletin – and its newfound emphasis on qualified visual

examination – caught FENOC unprepared. In the years prior to the bulletin, FENOC (and Geisen) had repeatedly deferred the design modification needed to enable full inspection and cleaning of the Davis-Besse reactor vessel head. Gov. Ex. 149 at 6; Gov. Ex. 21 at 6. During the same period, Davis-Besse personnel encountered large volumes of boric acid deposits, which they attributed to flange leaks, on the vessel head. (*See* pp. 12-18, *supra*.) These circumstances impeded inspection efforts and left Davis-Besse without comprehensive inspection data and at risk for regulatory shut down.

This possibility was not welcome news to FENOC managers. (Tr. VII/RE259, pp. 1223-1227, Moffitt). At the time of the Bulletin, Davis-Besse was nearly three-quarters through its fuel cycle. An inspection outage at the end of the year, just a few months ahead of the scheduled RFO, would greatly increase costs and hamper employee morale. (*Id.* at 1225-26; Tr. V/RE258, p. 822, Gibbs). Moreover, FENOC managers had already convinced themselves that the Oconee findings did not represent an immediate concern for Davis-Besse. (Tr. VII/RE259, p. 1225, Moffitt). Shortly before the bulletin was issued, Geisen signed a memorandum justifying continued operation until RFO 13, despite the fact that "[l]arge boron leakage" prevented "detailed inspection of the CRDM nozzles" during the prior inspection. (Apx. III:232-239, Gov. Ex. 26).

With confidence in Davis-Besse's ability to operate safely through RFO 13 and intent on not shutting down early – despite the absence of comprehensive inspection data – FENOC and Geisen resorted to dissembling. FENOC's initial bulletin response (Serial 2731) contained several significant misrepresentations and omissions. First, the letter baldly stated that the insulation service structure did not "impede" or "interfere with" inspections, (Apx. V:389, Gov. Ex. 60), statements contradicted by testimony, (Tr. V/RE258, p. 837, Gibbs; Tr. VII/RE259, 1170-80, Goyal), and the company's plan to install access doors at a future RFO. (Tr. VI/RE266; Apx. IX:644, Gov. Ex. 21; Apx. XII:823, Gov. Ex. 149). Second, while acknowledging that there was "some accumulation" of boric acid on the vessel head during RFO 12, the letter failed to disclose that the deposits flowed like "lava" out of the weep holes and prevented access to much of the head (pp. 12-13, *supra*), and falsely implied the company had done a full inspection to "bare metal" in accord with the BACCP. (Apx. V:389-90, Gov. Ex. 60). Third, despite the significant amounts of boric acid left on the head after RFO 12, (Tr. II/RE256, p. 190, Tabbert; Apx. IX:651, Gov. Ex. 65), the letter falsely reported that qualified visual inspection during RFO 13 "will *not* be compromised due to *any* pre-existing boric acid crystal deposits." (Apx. V:390, 392, Gov. Ex. 60) (emphasis added).

At trial, Geisen was personally implicated in each of these misrepresentations. While Geisen may not have been heavily involved in the drafting of Serial 2731, he admitted that his "greensheet" review included "go[ing] through the pertinent sections that deal with the design of the plant" to "make sure they sounded right" (Tr. X/RE268, p. 1861; Tr. Vo. XI/RE261, p. 1905), and that access to the reactor head was a "design" issue. (Tr. XI/RE261, 1963-64). On August 11, 2001, when Davis-Besse was mobilizing to respond to the NRC bulletin, Goyal sent Geisen an email stating that FENOC should plan to perform a "volumetric" examination (in addition to a qualified visual inspection) during RFO 13 – "even if" Davis-Besse did "not commit" to such action in its bulletin response – given that "*we cannot clean our head thru the mouse holes*." (Apx. III:280, Gov. Ex. 36) (emphasis added). Despite this warning, Geisen approved the statements in Serial 2731 that the insulation skirt did not "impede" or "interfere" with visual inspection. (Apx. V:389, Gov. Ex. 60; Tr. XI/RE261, pp. 1972-73, Geisen).

Further, although Geisen testified that he did not pay "special attention to information about past inspections" when reviewing Serial 2731 (*id.* at 1906), FENOC's inspection plans and results depended on FENOC's ability to inspect. Serial 2731 addressed access issues, inspection results, and inspection plans in

overlapping sections, (Apx. V:389-394, Gov. Ex. 60), permitting a rational juror to infer that Geisen reviewed all of these sections. At trial, Geisen admitted knowing – before approving Serial 2731 – that the 2000 inspection was "not reliable" due to boric acid deposits from "leaking flanges," (Tr. XI/RE261, p. 1967), and that the head cleaning (following the inspection) was not as "thorough as . . . intended."[8/] (*Id.* at 1949; *see also* Tr. IV/RE265, p. 505, Martin; Apx. XII:831, Gov. Ex. 155). Neither circumstance is disclosed in the letter. (Apx. V:389-394, Gov. Ex. 60). Based on this evidence, a rational juror could find, beyond a reasonable doubt, that Geisen signed Serial 2731, knowing that it was not a full and complete disclosure in response to NRC's request.

2. Geisen Knowingly Misled the NRC During Follow-Up Discussions on Serial 2731

After the NRC questioned Serial 2731, Geisen became a central player in responding to NRC's concerns about the letter's insufficiencies. Geisen testified that he presented inspection data during the October 3, 2001 conference call (Tr. XI/RE261, p.1909), when FENOC represented (falsely) that they had performed a

[8/]Geisen testified that he was "visualizing a qualified visual inspection as you either go do a visual inspection, but if you can't, you would then follow it up with an NDE." (Tr. XI/RE261, pp. 1249-50). The jury was left to square this excuse with the plain statement in Serial 2731 that qualified visual examination would "not be compromised." (Apx. V:392, Gov. Ex. 60).

"100 percent" inspection of the vessel head. (Tr. III/RE257, p. 247, Hiser; Tr. III/RE257, pp. 394-95, Miller). Geisen likewise testified that he presented the "facts" slide at the NRC Technical Assistants meeting on October 11, 2001 (Tr. XI/RE261, p. 1917), which falsely represented that "*all* CRDM penetrations were verified to be free from 'popcorn' type boron deposits using video recordings from 11 RFO or 12 RFO." (Apx. IX:667, Gov. Ex. 87) (emphasis added).

Geisen's defense – that he believed these statements to be true – was undermined by his own testimony. Geisen testified that he obtained the information about the 1998 and 2000 inspections by reading Serial 2731, by speaking to supervisors of the group that performed the inspections, and from the nozzle-by-nozzle table Geisen tasked Siemaszko with preparing. (Tr. XI/RE261, pp. 1908-9, 1917-18). As stated in Serial 2731, at the time of the letter (submitted September 4, 2001), FENOC had already "performed" a "review of the 1998 and 2000 inspection videotapes" to "re-confirm" that "the indications of boron leakage . . . at [Davis-Besse] were . . . not indicative of . . . nozzle leakage." This matches John Martin's testimony that Geisen told Martin that he (Geisen) reviewed inspection videos in August 2001. (Apx. XII:831, Gov. Ex. 155; Tr. IV/RE265, pp. 482, 505-507, Martin).

While Geisen attempts to impeach Martin's testimony – arguing that his interview notes were transcribed from "illegible" handwritten notes that no longer exist (*see Brief* at 44-45) – the statement that Geisen reviewed inspection videos in August 2001 is fully consistent with the chronology of the case. Further, the credibility of Martin's testimony was for the jury to determine and is not a matter for this Court to undertake in its limited review. *Gunter*, 551 F.3d at 479.

In any event, even if Geisen did not review the inspection videos in August 2001 but instead (per his testimony) only inquired of FENOC personnel in a position to know the results of the review, he would have learned, well before the October 11 meeting, that the 1998 and 2000 inspections were not comprehensive. In an apparent attempt to mask this point, Geisen testified that he did not "think" Siemaszko had completed the nozzle-by-nozzle table by the time of the October 11 meeting. (Tr. XI/RE261, pp. 1918). However, it was not necessary for Siemaszko to finish the table (assigning inspection results to each nozzle) to know that the 1998 and 2000 inspections did not cover nozzles high on the reactor vessel head. Moreover, if Geisen did not learn the 1998 and 2000 inspections were incomplete until Siemaszko completed the table, and if the table was not complete at the time of the October 11 meeting, Geisen had no basis for the assurance he provided the NRC. (*Id.* at 1990).

3. Geisen Knowingly Misled the NRC Regarding the Extent of the 1996 Inspection

As Geisen acknowledged, once Siemaszko completed the nozzle-by-nozzle table, "there were clearly drives [nozzle penetrations]" that Davis-Besse "could not take credit for inspecting" in 2000 or 1998. (*Id.* at 1919). According to Geisen, "as soon as" he learned this information, he told Siemaszko to "expand that table . . . to add in 1996," and told Moffittt that they "would need to correct the information" provided to the NRC. (*Id.* at 1920). Geisen now argues (*Brief* at 14, 21) that these steps "to correct inaccurate information" demonstrate his innocence.

To the contrary, the evidence revealed a continuing scheme to misrepresent. Although more comprehensive than the inspections in 1998 and 2000, the 1996 video inspection also did not cover the entire reactor vessel head, (Tr. IV/RE265, pp. 551, 658-659, Holmberg; Tr. VI/RE266, p. 928, Goyal; Apx. XI:803-810, Gov. Ex. 129), and was not even mentioned in FENOC's initial bulletin response. (Apx. V:389-394, Gov. Ex. 60). When the NRC persisted in seeking details about prior inspections, Geisen and other FENOC managers faced a choice: concede that the company lacked the data to support the conclusions in Serial 2731, or continue to misrepresent and conceal.

FENOC chose the latter course. Through Serial Letters 2735, 2741, 2744, and 2745, and at meetings with the NRC on October 24 and November 28, 2001, FENOC repeatedly and falsely represented that the previously unmentioned1996 inspection covered the "entire" head, that 65 of 69 nozzles were verified leak free upon review of the inspection video, and that the only nozzles excluded from qualified visual inspection were those determined, in the SIA analysis, not to be subject to such examination. (*See* pp. 28-30, *supra*.) In Serial 2744, FENOC also presented selected images of the inspections as "representative" of the condition of the head, without revealing the many images that showed worse conditions (larger piles of boric acid). (*See* pp. 14-18, *supra.*)

That Geisen played a central role in these false statements is undisputed. Geisen testified that he directed Siemaszko to create the nozzle-by-nozzle table, that he was responsible for Siemaszko's work, that he spent at least an hour going over inspection videos with Siemaszko, and that he vouched for Siemaszko's work. (Tr. XI/RE261, pp. 1912-1916). Geisen further admitted that he wrote the captions for the photos in Serial 2744, (*id.* at 1926), and that he presented the inspection results in meetings with the NRC. (*Id.* 1909, 1917, 1923). Geisen does not dispute the falsity of the representations, or Siemaszko's knowledge of the truth. Nor does the record provide any motive for Siemaszko to conceal the truth

from Geisen. Given Geisen's personal involvement in compiling and presenting the data, Geisen's position in the company, and the significance of a potential shut down to FENOC, the jury had ample evidence from which to infer that Geisen knowingly and willfully provided the false information to the NRC.

B. The Evidence Demonstrated Deliberate Ignorance

There was also evidence from which the jury could find deliberate ignorance. As the court instructed the jury, a defendant cannot evade criminal liability – including liability for false statements to regulatory officials – by deliberately avoiding culpable knowledge. *United States v. Arnous*, 122 F.3d 321, 323 (6th Cir. 1997).

In his testimony, Geisen made several statements that (if credited) demonstrated a deliberate disregard for the truth. First, as already noted (p. 48, *supra*) Geisen testified: (1) that he assured the NRC Technical Assistants, at the October 11, 2001 meeting, that the 1998 and 2000 inspections (in combination) covered all nozzles and showed all nozzles to be leak free; and (2) that the basis for this representation was Siemaszko's work, which had not yet been completed. (Tr. XI/RE261, pp. 1917-18, 1989-90). If true, this means that Geisen personally vouched for the comprehensiveness of the inspections, without any basis for doing so. Geisen's argument (*Brief* at 5, 46) that he relied on the false statements in

Serial 2731 is a *non sequitur*. The very purpose of the meetings was to provide information missing from that letter.

Second, Geisen testified that he could not say that he "actually spoke face to face" with Siemaszko, about the single-most important purported result of Siemaszko's nozzle-by-nozzle review; *viz.*, that the 1996 video enabled Davis-Besse to verify that 65 of 69 nozzles were leak free. (Tr. XI/RE261, p. 1992). Given Geisen's knowledge of plant conditions, this purported result was dubious on its face. The 1996 inspection was subject to the same impediments that limited the subsequent inspections: lack of access and pre-existing boric-acid deposits from chronic flange leaks.[9] Further, the purported success rate (65 of 69 nozzles verified leak free) resulted in a strikingly fortuitous coincidence for Davis-Besse: the only nozzles excluded from qualified visual inspection (nozzles 1-4) happened to be those nozzles that would not leak (per the SIA report). Although Geisen had no reason to believe that SIA contrived its analysis around Siemaszko's video review, the converse possibility was apparent.

---

[9]Geisen was repeatedly warned of these limitations during the bulletin response period. For example, on September 14, 2001, Gibbs left a report on Geisen's desk reiterating the need for access doors to permit inspection and cleaning, noting that "boric acid deposits of considerable depth" were left on top of the head after RFO 12. (Apx. IX:651, Gov. Ex. 65) (*See also* Apx. III:280, Gov. Ex. 36).

Third, Geisen testified that he did not talk to Siemaszko, or any of the other engineers who had performed the inspections, about the captions he prepared for the photos in Serial 2744. (Tr. XI/RE261, 1927). According to Geisen, Seimaszko compiled the photos without his (Geisen's) assistance, and then Geisen "created" the captions based solely on his memory of "previous conversations." *Id.* Geisen further testified that he "stopped by" Siemaszko's cubicle only once, when Siemaszko was preparing the nozzle-by-nozzle table, and that Siemaszko showed him some video clips and explained how he was able to verify that boric acid deposits were not from nozzle cracking. (*Id.* at 1912-1915). Geisen admitted no other collaboration with Siemaszko and denied ever reviewing the inspection videos on his own. (*Id.* at 1932). This left the jury to understand that Geisen interpreted images and made critical representations about past inspections – *e.g.*, that certain boric acid deposits were "verified not to be active or wet" (Apx. VIII:570, Gov. Ex. 113) – without any confirmed basis for doing so.

Altogether, this testimony suggested that Geisen was more interested in making representations that served Davis-Besse's interests than in providing complete answers to NRC's questions; and that Geisen was willing to look past the many warnings indicating that Davis-Besse's previous inspections did not measure up to the standard NRC was seeking. Thus, even if the jury gave Geisen

the benefit of the doubt on his assertions that he did not review the inspection tapes or collaborate explicitly with Siemaszko on the fabrication of the false nozzle-by-nozzle analysis, the jury had sufficient evidence from which to conclude, beyond a reasonable doubt, that Geisen deliberately disregarded a high probability that the analysis was false, so he could present information to the NRC that served Davis-Besse's short-term interest.

C. The Government Proved Motive

Contrary to the Geisen's argument (*Brief* at 23-24), the Government did not fail to prove a motive for deliberate falsifications. In asserting (*Brief* at 23) that the Government failed to show a reason for him to have "jeopardize[d] his livelihood or liberty," Geisen ignores the context of the misrepresentations. As Geisen otherwise acknowledges (*Brief* at 19), the bulletin responses came under intense scrutiny only because of the discovery of the large cavity in the reactor vessel head, something no one at Davis-Besse anticipated. Geisen testified that he believed Davis-Besse was "safe to operate." (Tr. XI/RE261, pp. 1981-82.) Further, the evidence showed that Geisen came to that belief in June 2001, before the NRC bulletin and despite acknowledged problems with prior inspections. (Apx. III:232-239, Gov. Ex. 26).

Because Geisen thought nozzle-cracking to be a distant concern (not one that would manifest in a significant way during RFO 13) – and because the RFO 13 inspection would be the first at Davis-Besse in the aftermath of Oconee – Geisen had little reason to think there would be regulatory interest in the prior inspections, or regulatory scrutiny of the bulletin responses, once Davis-Besse got to and beyond RFO 13. In contrast, Geisen was acutely aware of the immediate negative impact on FENOC, if Davis-Besse were required to shut down before RFO 13, and of his supervisors' desire to avoid early shutdown. (Tr. XI/RE261, pp. 1975-1981, Geisen). In this context, Geisen had substantial cause to think that his personal and professional interests would be better served (at FENOC) by fending off the NRC's shutdown threat, than by truthfully disclosing, to the NRC, the absence of comprehensive inspection data.

II. THE DELIBERATE IGNORANCE INSTRUCTION WAS PROPER AND AT MOST HARMLESS ERROR

Contrary to Geisen's argument (*Brief* at 50-51), the Government did not act inconsistently in requesting a deliberate ignorance instruction in response to Geisen's testimony (p. 51-53, *supra*), while also arguing that the jury could find actual knowledge. As explained (*id.*), there was sufficient evidence to support a finding that Geisen deliberately avoided knowledge of the falsity of

misrepresentations made to the NRC. Where the evidence permits, the Government may pursue alternative theories of liability, including alternative theories of actual knowledge and deliberate ignorance. *United States v. Heredia*, 483 F.3d 913, 923-24 (9th Cir. 2007); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1410 (10th Cir. 1991).

Further, even if this Court determines that the deliberate-ignorance instruction was not warranted by the evidence, the trial court's decision to give the instruction would be at most harmless error. In *Griffin v. United States*, the Supreme Court held that, when a trial court instructs a jury on two grounds for conviction, only one of which is warranted by the evidence, an appeals court must presume that the jury followed the instructions and convicted on the theory with evidentiary support. 502 U.S. 46, 55-59 (1991). Stated differently, the giving of an accurate (though unsupported) instruction is "harmless as a matter of law." *United States v. Mari*, 47 F.3d 782, 786 (6th Cir. 1995) (describing *Griffin*).

As this Court determined in *Mari*, the logic of *Griffin* applies to deliberate-ignorance cases; *i.e.*, cases (like the present) where a defendant contends that the deliberate-ignorance instruction was not warranted by the evidence. *Id.* at 785-87. *Mari* held that if a conviction is supported by evidence of actual knowledge, the mere giving of the deliberate-ignorance instruction cannot be a basis for reversal.

Id.; *accord United States v. Ross*, 502 F.3d 521, 528 (6th Cir. 2007); *United States v. Monus*, 128 F.3d 376, 390-91 (6th Cir.1997).

Geisen's efforts to distinguish *Griffin* and *Mari* law are unavailing. First, *Geisen* argues (*Brief* at 52) that *Mari* misapplied *Griffin*, because *Griffin* involved "factual inadequacy," while *Mari* (and the present case) purportedly involve "legal inadequacy." Even if this characterization were accurate, it would provide *Geisen* no relief, as *Mari* is controlling law. But Geisen's characterization is not accurate. In *Griffin*, the Supreme Court determined that there is a "clear line" between cases where a trial court makes a "mistake about the law" and cases where a court gives a legally correct instruction unsupported by the evidence. 502 U.S. at 59. The Supreme Court determined that jurors are "equipped" in the latter circumstance, to apply the law to the facts and reject a factually-unsupported theory. *Id. Mari* applied this same logic, 47 F.3d at 785-87, which is equally applicable here.

Second, Geisen argues (*Brief* 52-53) that the deliberate ignorance instruction was peculiarly inappropriate in this case, because the record was "replete with evidence of what a supervisor in Mr. Geisen's position 'should have' done," thus presenting a heightened danger that the jury would be "misled" into convicting on a theory of negligence. This argument ignores the plain language of the court's instructions.

Following the Sixth Circuit pattern instruction, the trial court advised the jury that it could not convict upon a finding of "negligence, carelessness, or foolishness" and repeatedly emphasized the need to find "deliberate" misconduct. Tr. XIII/RE262, pp. 2326, 2334, 2338-2339). Further, when stating the elements of the offense, the court advised the jury of its need to find that Geisen acted knowingly and willfully; that is, with the intent to deceive. (*Id.* at 2334, 2336-2338). To be sure, the line between negligent and knowing conduct can be difficult to draw in a case where a defendant's knowledge must be inferred from circumstantial evidence. However, the court's instruction left no doubt that proof of negligence was not enough. In *Mari*, this Court determined that the pattern instruction "forecloses the possibility" that the jury will mistakenly convict on negligence grounds. 47 F.3d at 585.

III. THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE THAT GEISEN DECLINED A DEFERRED-PROSECUTION AGREEMENT

Under Federal Rule of Evidence 403, a trial court may exclude evidence if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court exercises "very broad" discretion when

weighing these factors. *U.S. v. Bilderbeck*, 163 F.3d 97, 978 (6th Cir. 1999); *United States v. Miller*, 115 F.3d 361, 365 (6th Cir. 1997). Here, the district court properly exercised its discretion to exclude evidence regarding the Government's offer of a deferred prosecution agreement (p. 36, *supra*).

First, there was little, if any, probative value to the evidence. Geisen contends (*Brief* at 56) that his rejection of the Government's offer demonstrates "consciousness of innocence" because an "innocent person was more likely to reject [the] conditional dismissal[10/] of all charges than a guilty person." This argument overlooks the many additional variables that could have informed Geisen's decision, including: (1) the personal and professional impact of admitting wrongdoing;[11/] (2) the obligation to cooperate against others; (3) the possibility of facing prosecution on stipulated facts, upon a breach of the agreement; (4) the possibility that the Government would not proceed with indictment in any event; and (5) the likelihood of succeeding at trial, if indicted. As the trial court correctly recognized (Tr. X/RE268, p. 1815), there were simply "too many variables" at issue in Geisen's decision to reject the deferred prosecution offer, to give that act

---

[10/]The proposed agreement was a pre-indictment offer, before the filing of charges. (ROA 474, *Motion in Limine*, Att. A).

[11/]*See* 10 C.F.R. § 50.5(b) (providing administrative enforcement actions, including against the employee of any licensee, for false statements or other deliberate misconduct).

evidentiary significance as to Geisen's state of mind at the time the false statements were made to the NRC.

Second, there was a substantial possibility that testimony regarding the deferred prosecution agreement would have drawn the jury into extraneous, confusing, and privileged matters. Geisen declined the Government's offer through counsel. The advice that counsel provided – *e.g.*, advice on the strength of the Government's case, the likely outcome of any prosecution, and the risks of the deferred prosecution agreement – is critical to determining whether any inference regarding "consciousness of innocence" reasonably can be drawn from Geisen's rejection of the offer. Geisen's argument (*Brief* at 60) that the Government could have explored "conflicting inferences . . . on cross-examination and during argument" is not well considered. The Government could not have inquired into such matters, on cross-examination or otherwise,[12/] without making his attorneys material witnesses and invading the attorney-client privilege.

Third, any proof that Geisen rejected a deferred prosecution agreement would have required proof regarding the Government's offer. Under the Federal Rules of Evidence, offers of compromise are inadmissible to prove "liability" or the "invalidity of . . . a claim." Fed. R. Evid. 408. This means that Geisen could

---

[12/]Geisen's motion and the trial court's ruling preceded his taking the stand to testify. (Tr. X/RE268, pp. 1815-16).

not have properly introduced the Government's offer to prove the weakness or "invalidity" of any charge in the indictment. Although Geisen sought to make evidentiary use of his rejection of the offer – as opposed to offer itself – the two are difficult (if not impossible) to disentangle. Permitting defendants to prove their innocence by rejecting plea offers or offers of deferred prosecution would discourage such offers and the settlement of criminal cases. Further, if permitted, such evidence would invite jurors, when scrutinizing a defendant's motive for rejecting an offer of compromise, to speculate about how the offer differs from the likely consequences of conviction at trial. Except where a jury has a role in sentencing, evidence about penalties is generally inadmissible. *United States v. Stotts*, 176 F.3d 880, 886 (6th Cir. 1999) (citing *Shannon v. United States*, 512 U.S. 573, 582 (1994)).

In arguing that the trial court abused its discretion in acting to avoid such entanglements, Geisen relies exclusively on the Second Circuit's decision in *United States v. Biaggi*, 909 F.2d 662, 690-691 (2d. Cir. 1990). That case involved an offer of immunity that a defendant rejected "on the ground that he [was] unaware of any wrongdoing about which he could testify." *Id.* at 690. The Second Circuit reversed a trial court decision to exclude such evidence, finding it to be "probative of a state of mind devoid of guilty knowledge." *Id.* The court

reasoned that "most people" with guilty knowledge would "jump" at an "opportunity to preclude all exposure to a conviction and its consequences." *Id.* at 691.

In so holding, however, the Second Circuit distinguished immunity agreements from plea agreements, noting that the rejection of a plea agreement "might simply mean that the defendant prefers to take his chances on an acquittal by the jury, rather than accept the certainty of punishment after a guilty plea." *Id.* The Eighth Circuit subsequently refused to extend the logic of *Biaggi* to the rejection of plea agreements. *United States v. Greene*, 995 F.2d 793, 798 (8th Cir. 1993) (following *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir.1976)) (rejection of plea agreements inadmissible). The Eighth Circuit also questioned whether there is a "relevant distinction" between the rejection of plea agreements and the rejection of immunity agreements, suggesting that neither should be admissible. *Greene*, 995 F.2d at 798; *but see United States v. Maloof*, 205 F.3d 819, 824 (5th Cir. 2000) (testimony regarding the rejection of immunity agreement properly admitted). This Court has not addressed the issue.

A deferred prosecution agreement is neither a plea agreement nor an immunity agreement. In the words of *Biaggi*, it does not "preclude all exposure to a conviction and its consequences" (like an immunity agreement) or provide "the

certainty of punishment after a guilty plea" (like a plea agreement). Significantly, however, for purposes of Rule 403, there is no way to distinguish a deferred prosecution agreement from a plea agreement. Both are offers of compromise that a defendant might reject, following consultation with counsel, for a multiplicity of reasons that have little or nothing to do with "consciousness of innocence." In the present case, the district court weighed the Rule 403 factors and determined that the probative value of Geisen's rejection of the deferred plea agreement did not outweigh the unfair prejudice and juror confusion that would arise if the evidence was admitted. This was not an abuse of discretion.

Contrary to Geisen's observation (*Brief* at 60), the fact that the trial court allowed limited testimony from other witnesses about their status in the investigation (*see* p. 5, *supra*) does not undermine the court's decision to exclude evidence about the Government's offer to Geisen. It is well settled that the Government may impeach its own witnesses by eliciting testimony concerning relevant agreements with prosecutors. *United States v. Townsend*, 796 F.2d 158, 162 (6th Cir. 1988); *see also* Fed. R. Evid. 607. In this appeal, Geisen does not argue that the trial court erred in permitting such testimony from Government witnesses. Rather, Geisen argues (*Brief* at 61) that the disparate treatment could have "induc[ed] jurors to mistakenly believe that only Mr. Geisen was denied

leniency by the Government." The Government's pre-indictment prosecutorial decisions regarding Geisen are not relevant to Geisen's guilt or innocence and are not properly considered by the jury.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Division

/s/ John L. Smeltzer

THOMAS T. BALLANTINE
KATHERINE J. BARTON
JOHN L. SMELTZER
Attorneys, Department of Justice
Washington, DC 20530
(202) 305-0343

February 4, 2009
DJ # 198-57-00564

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND LENGTH LIMITATIONS

1. This brief has been prepared using 14 point, proportionally spaced, serif typeface, *i.e.*, WordPerfect 8, Times New Roman, 14 point.

2. Exclusive of the table of contents, table of authorities, and statement of related cases, this brief contains **13,870** words.

/s/ John L. Smeltzer

John L. Smeltzer

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Section 10.1 of this Sixth Circuit Guide to Electronic Filing, that the foregoing **Answering Brief for the United States** has been served on this 4th day of February 2009 upon the following registered counsel of record, *via* this Court's Electronic Case Filing ("ECF") system.

Richard A. Hibey
Andrew T. Wise
Timothy P. O'Toole
Miller & Chevalier
655 Fifteenth Street, NW
Suite 900
Washington, DC 20005
rhibey@milchev.com
awise@milchev.com
totoole@milchev.com

/s/ John L. Smeltzer

John L. Smeltzer