

October 7, 2009 (8:00am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of)	Docket No. IA-05-052
)	
DAVID GEISEN)	ASLBP No. 06-845-01-EA
)	

**DAVID GEISEN'S ANSWER OPPOSING THE STAFF'S APPLICATION
FOR A STAY OF THE EFFECTIVENESS OF LBP-09-24
PENDING COMMISSION REVIEW**

PREFACE

On August 28, 2009 – after a five-day hearing and in a 145 page order composed of carefully rendered, intricate fact findings – the Atomic Safety and Licensing Board (“Board”) set aside the January 4, 2006 Enforcement Order that banned Mr. Geisen from working in the nuclear industry for five years (“Decision” or “Initial Decision.”) The Board majority was composed of the panel’s Chairman and its Technical Judge. The Board determined that Mr. Geisen may immediately seek employment in the nuclear industry. Decision at 120.¹ The Board based its decision primarily on the credibility of witness testimony, including that of Mr. Geisen, and on evidence adduced throughout this proceeding and Mr. Geisen’s criminal trial. The Staff has petitioned for Commission review of this decision, and accordingly seeks to stay its immediate effect while the Commission considers the Staff’s request for review. The Staff has not met the criteria necessary for the Commission to grant the requested stay. As a result, the Commission should deny the Staff’s request.

¹ Mr. Geisen’s ability to regain employment in the nuclear industry is subject to the a change in the terms of his sentence from his federal criminal case in the Northern District of Ohio. See footnote 6, *infra*.

DISCUSSION

I. Essential Elements for the Granting of a Stay.

To be granted a stay, the Staff must meet the standards that apply to the granting of a preliminary injunction in Federal Court.² Of the five factors on which the Staff has the burden of persuasion, *see* Application at 3, “the most crucial is whether irreparable [harm has been] incurred by the movant absent a stay.” *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2)*, CLI 81-27, 14 NRC 795, 797 (1981). The Staff’s claim that only the “potential” for irreparable injury must be shown, *see* Application at 4, is simply wrong. Irreparable injury “must be likely, ‘not just a possibility.’”³ If irreparable injury is not shown, that failure cannot be made up by proving even an “overwhelming” likelihood of success on the merits.⁴ Indeed, if the likelihood of irreparable harm is not established, further inquiry appears to be unnecessary.⁵

Because irreparable harm is “crucial” to consideration of an application for a stay, the Commission should deny the Staff’s request for a stay because it cannot show irreparable harm. That said, even if its showing of likelihood of success on the merits is “overwhelming,” The Staff cannot cover non-existent irreparable harm. In any event, as will be shown, the Staff has failed to make such a showing.

II. There is no Irreparable Harm to Warrant a Stay.

The Staff acknowledges that it must show harm that is “certain and great.” Application at 7

² *Boston Edison Co. (Pilgrim Nuclear Power Station)*, ALAB-81, (November 15, (1972)).

³ *Davis v. PBGC*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (citing *Winter v. NRDC*, 129 S.Ct. 365, 2008 U.S. Lexis 8343).

⁴ *Davis*, 571 F.3d at 1295; *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

⁵ An exception to the crucial value of the irreparable harm element is where the public interest in national defense is implicated. *See Winter v. NRDC*, 129 S.Ct. 365, 75-76, U.S. Lexis 8343 (2008).

(internal citations omitted). The Staff claims an interest in “ensuring that the five-year ban . . . remains in force for its full term,” and it claims that it has some interest in “the deliberations of the district court” that would be “inappropriately interfered with” if a stay is not granted. *Id.* at 7-8. The first alleged harm is neither certain nor great. If the Board’s order takes immediate effect, it is superseded by the sentence in the criminal case, which the Staff recognizes runs five months longer than would the Enforcement Order. *Id.* at 7. Even though the District Court is willing to reconsider its ban, it is not a certainty that the Court would do so. In any event, this argument fails to explain how his return to employment is irreparably harmful to the Staff or anyone else. The Staff cannot show that Mr. Geisen is any threat to the Staff or the public. It is undisputed that he worked at the Keewanee Plant for three years after the Davis-Besse incident and up to the time he was debarred, and in that time, “[no] question [arose] about the quality or integrity of [his] work.” Tr. at 1779. Indeed, his last employer held open the possibility of re-employment once his status was restored. Dissent at 66.

The Staff has not shown how any alleged interference with the District Court’s “deliberations” in the criminal case constitutes any sort of harm to the Staff. In fact, it has not shown how the Board’s Order constitutes harm to the District Court. The Court has already considered the possibility that Mr. Geisen might petition for modification of its ban.⁶ Thus, if anything, the Board’s Order *facilitates* the Court’s deliberation. The Staff cannot show irreparable harm, and its

⁶ At his sentencing, the Judge, the Honorable David Katz, indicated his willingness to consider lifting Mr. Geisen’s three-year ban if he succeeded in prevailing in the NRC administrative process. See Transcript of Criminal Case Sentencing at 30:4-16, May 1, 2008. Attachment 1. The trial judge invited Mr. Geisen to make his application for relief from the three-year ban. As a matter of law, Judge Katz is free to remove that ban regardless of how the U.S. Court of Appeals for the Sixth Circuit, to which the conviction has been appealed, rules. Whether it affirms or reverses the conviction does not alter the power of the judge to address the ban. Therefore, if the stay application is denied, and even though the criminal case is pending appeal, procedural steps can be taken to return the case from the Sixth Circuit to the trial court for the purpose of modifying the sentence and thereafter to return the case to the docket of the appellate court for its disposition of the appeal.

Application should be denied.⁷ Recognizing the weakness in its showing of irreparable harm, the Staff asserts that the Initial Decision is “fatally flawed,” and that its “‘overwhelming’ showing that the Majority’s decision is likely to be reversed on the merits” should compensate for that weakness. Application at 8. As set forth below, the Staff has failed to show likelihood of success on the merits, overwhelming or otherwise, and any showing it could make will not salvage its failure to show irreparable harm.⁸

III. **No Likelihood of Success on the Merits; Therefore No Stay is Warranted.**

A. ***No New Test; Rather a Thought Process for Determining Credibility of Witnesses.***

In this case, the Board determined the Staff failed to carry its burden of proof that Mr. Geisen violated 10 C.F.R. 50.5(a)(2) by knowingly providing incomplete and inaccurate information to the NRC. Contrary to the Staff’s assertion, the Board did not apply some “five factor test” to make its decision (that term exists nowhere in the Board opinion), nor did it hold the Staff to an improper burden of proof. To the extent the “factors” articulated by the staff can be found in the Initial Decision, they, along with the “knowledge hierarchy” the Board discusses, Decision at 32, simply stand for the unremarkable proposition that what one remembers about information to which one is exposed depends on the context in which that information is received. It is the Staff that attempts to manipulate the burden of proof. Its declaration of a five-factor test is a strawman interposed to evoke *de novo* scrutiny of the Initial Decision on the grounds that it was procedural legal error.

⁷ The only irreparable harm anyone can point to is that which has been visited upon Mr. Geisen. It took him about three weeks shy of three years to get a hearing, and during that time he was “deprive[ed] of the legally-acknowledged right to pursue [his] livelihood.” Decision at 123-24. Granting a stay of the Board’s order on the Staff’s arguments here would not harm the Staff, but it would harm Mr. Geisen as he would be effectively precluded from petitioning the trial judge for relief from a condition of his sentence. The Staff’s position is callous; what it asks the Commission to do, unfair.

⁸ *Davis v. PBGC*, 571 F.3d 1288, 1292

B. *The Board Evaluated All the Evidence and Based its Decision on the Credibility of Witnesses*

The Staff complains that “the Majority improperly discounted the Staff’s extensive circumstantial evidence of Mr. Geisen’s knowledge.” This *ipse dixit* comment is indicative of the Staff’s mindset throughout this proceeding. It decided that Mr. Geisen was guilty, and it filtered all the evidence through that prism, discounting as improper or illegitimate any conclusion that did not match its theory of the case.⁹ Contrary to the Staff’s assertions, the Board did review all the evidence. It recognized that “circumstantial evidence can be compelling,” Initial Decision at 132, but it made its decision about Mr. Geisen’s knowledge in part through “the demeanor and substance of his testimony [which showed] that he provided fully credible and believable explanations for why [he] believed what he did, and why his submissions to the NRC comported with those beliefs.” *Id.*

The Board determined that the Staff failed to put on evidence, circumstantial or otherwise, sufficient to upset the Board’s credibility determinations:

[t]he presence of evidence of that nature would have spoken forcefully about the state of Mr. Geisen’s knowledge. Its absence likewise speaks loudly -- the investigation apparently did not reveal a single co-worker who, based on his observations of, or interactions with, Mr. Geisen saw any conduct or heard any words that were incriminating.

Id. (Footnote omitted). The Board determined that testimonial evidence the Staff did put on actually supported the conclusion that Mr. Geisen did not know “of the possible severity of the underlying problems.” *Id.* at n.168 (citing the testimony of Prason Goyal). In short, it is the Board’s role to make credibility determinations. It did so, and that decision is entitled to deference. *See Tennessee*

⁹ *See* Decision at 133 n.169 (discussing the Board Chairman’s “impatience . . . with what was perceived as Staff counsel’s inordinate focus on what Staff officials were thinking at critical times, rather than on Mr. Geisen’s state of mind (see, e.g. Tr. at 1037-38, 1043, 1222) . . . [T]he problem was not lack of focus, but lack of evidence.” *Cf. Bishop v. United States*, 107 F.2d 297, 303 (1939), discussing in the criminal context the probative value of the absence of evidence and its impact on the burden of proof (“Reasonable doubt is a doubt arising from the evidence, or from a lack of evidence, after consideration of all the evidence.”). *Accord, United States v. Hoffman*; 964 F.2d 21, 25 (D.C. Cir. 1992); *United States v. Poindexter*, 942 F.2d 354, 360 (6th Cir. 1991); *United States v. Thompson*, 37 F.3d 450, 453 (9th Cir. 1994).

Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 189 (2004) (“TVA”) (that ““We ordinarily defer to our licensing boards’ fact findings, so long as they are not clearly erroneous’ . . . [o]ur deference is particularly great where the ‘Board bases its findings of fact in significant part on the credibility of the witnesses.’”) (internal citations omitted).

IV. **Equating Disagreement over Credibility-based Findings with the “Clearly Erroneous” Standard Perverts the Meaning of that Narrow Standard.**

The Staff attacks the Board’s fact finding as “clearly erroneous.” Application at 6. As the Staff is well aware:

A “clearly erroneous” finding is one that is not even “plausible in light of the record viewed in its entirety.” As we stated in *Claiborne Enrichment Center*, “[a]lthough the Commission has the authority to reject or modify a licensing board’s factual finding, it will not do so lightly.” “We will not overturn a hearing judge’s findings, imply because we might have reached a different result.”

TVA, CLI-04-24, (2004), 60 NRC at 189 (internal citations omitted).¹⁰ The most the Staff shows in its Application and in its Petition for Review is that one could disagree with the Board’s decision. It has not shown that that decision is clearly erroneous, thus it cannot show the likelihood of success on the merits that would warrant a stay.

A. ***Evidence of Mr. Geisen’s knowledge, or the lack thereof.***

As aforementioned (*see* III.B. *supra*), the Board credited Mr. Geisen’s testimony regarding what he knew and when he knew it respecting the viewability of nozzles on the reactor vessel head, and they found nothing to support the idea that he knew he was wrong when he provided the incorrect information to the NRC. Mr. Geisen’s hearing testimony at Tr. 1958-59 does not upend this

¹⁰ *See also Culp v. Daimlerchrysler Corp.*, No. 04-1478, 2005 U.S. App. LEXIS 17826, at 7 (6th Cir. Aug. 16, 2005) (a verdict is clearly erroneous where it is “contrary to all reason.”); *Accord, Serv. Source, Inc., v. Office Depot, Inc.*, 259 Fed. Appx. 768, 773 (6th Cir. 2008).

conclusion. The Staff's reference to this testimony misrepresents what he said and what the Board found. Instead of cherry-picking portions of what he said, the Board considered Mr. Geisen's entire testimony. *See* Initial Decision at 80-81 (citing Tr. 1957-60). *See also* Attachment 2.

B. Videotapes: still or running?

The Staff objects to the Board's determination that Mr. Geisen viewed still frames of digitized video-tapes. Application at 6.¹¹ In support of its objection, the Staff refers the Commission to Mr. Geisen's 2002 OI interview.

The OI transcript of its interview of Mr. Geisen in October, 2002 does virtually nothing to support the Staff's position. During the OI interview Mr. Geisen twice said his review was of "portions" of videotapes. The OI investigator, a thoroughly impeached witness in Mr. Geisen's criminal trial (*see* Oct. 12, 2007 Criminal Trial Transcript of Testimony of Agent Joseph Ulie at 1524-1575,) never raised with Mr. Geisen any question about how the portions were presented. It is true that Mr. Geisen never said in that interview that he saw still frames. It is also true that he never said he saw videotapes in running fashion. As the Board points out, using this inconclusive evidence to decide that Mr. Geisen saw videotapes in running fashion is nothing more than "rank speculation." Decision at 139. Such speculation is particularly inappropriate in light of Mr. Geisen's direct testimony at the hearing that he only saw still frames. Tr. at 1697. In addition, the Staff's position ignores the fact that it is the Staff, not Mr. Geisen, who has the burden of persuasion on this point.

Again, the Staff's hindsight arguments fail to incorporate the entire context of the Board's decision. Instead, it picks and chooses selected quotations of testimony and claims that a

¹¹ The Staff's reference to the Decision at 139-40 conflates the issue of whether Mr. Geisen saw still frames of videotapes or whether he saw them in running fashion with the issue of when he saw those tapes. The Application purports only to address the still frame issue and Mr. Geisen will address that issue here, however, for reasons articulated in his Opposition to the Staff's Petition for Review, Mr. Geisen also objects to the Staff's interpretation of the evidence regarding when he saw the videotapes.

circumstantial case has been made that proves Mr. Geisen lied to the NRC and that evidence of this was “ignored” by the majority. The judges of the majority did not “ignore” evidence; if anyone did, it is the Staff, and the Staff’s disagreement with the Board does not make its findings “clearly erroneous.”

C. *The Greensheet.*

It was not “clearly erroneous” for the Board to conclude that Mr. Geisen was not “the” manager responsible for the letter’s [Serial Letter 2731] technical accuracy.” Initial Decision at 59. In its discussion of this finding, however, the Staff misquotes the Board’s statement. The judges were careful to place quotation marks on the word “the” to emphasize that, contrary to the Staff’s position, Mr. Geisen was not solely responsible for the accuracy of the entire greensheet. Id. at 17. These marks are not set out on page 7 of the Application. Thus, they missed the meaning of the finding they say was clearly erroneous. The deletion is compounded by citing only to Mr. Geisen’s hearing testimony at Tr. 1901-02. The full context of his testimony includes his colloquy with Judge Trikouros (and briefly, with Judge Farrar). Tr. 1902-04. See Attachment 3. There, Mr. Geisen explained there were many signatories of the greensheet who were responsible for reviewing Serial Letter 2731. If there was an area of the document not within his technical knowledge, he made sure to check that those who did have the expertise had reviewed and approved the document by signing off on the greensheet. Tr. 1903. See also Initial Decision at 17.¹² But had Mr. Geisen seen something in the document he “knew as wrong” he would not have signed the greensheet. Tr. 1904.

V. The Board’s Discretion Not to Apply Collateral Estoppel was Properly Exercised.

The Supreme Court has vested broad discretion in tribunals to determine when collateral estoppel should be applied. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); Initial

¹² The Davis-Besse approach to review and approval is different than the procedure at Kewaunee where one manager or director is responsible for review of the entire document. Tr. 1904.

Decision at 36; *id.* at n.59. The case cited by the Staff suggests that collateral estoppel is mandatory only after a showing that the factors supporting collateral estoppel apply to the particular case.¹³ The Staff cannot show that collateral estoppel applies in this case. Established case law makes it clear that “[t]he party seeking to preclude relitigation of an issue has the burden of showing that the same issue was ‘actually and necessarily determined’ in a prior litigation.” *Connors v. Tanoma Mining Co., Inc.*, 953 F.2d 682, 684 (D.C. Cir. 1992) (internal citations omitted).¹⁴ The Staff has acknowledged that willful or deliberate ignorance would not rise to the standard of knowingly providing incomplete or inaccurate information under 10 C.F.R. 50.5(a)(2).¹⁵ Accordingly, the Staff based its case solely on actual knowledge. Tr. of Oral Argument Re David Geisen at 2397, Mar. 3, 2009; Initial Decision at 42 n.77. In Mr. Geisen’s criminal case, the jury was instructed that it could convict Mr. Geisen on his actual knowledge, or on a theory of deliberate ignorance. Because the jury provided a general verdict, there is no way to determine on what basis it made its decision, thus, the Staff cannot show that Mr. Geisen’s actual knowledge was “actually and necessarily determined” in the criminal trial.¹⁶

By excluding from its case any reference to the deliberate ignorance standard on which the

¹³ *Toledo Edison Company, The Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1,2 and 3), The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-378 (March 1, 1977).

¹⁴ The Board carefully considered the collateral estoppel issue. See Decision at 37-53. Mr. Geisen incorporates those arguments here, along with the arguments he set forth in his Opposition to the Staff’s Collateral Estoppel (Nov. 26, 2008).

¹⁵ Decision at 40-41, n.70 (“[the] Staff acknowledges that the 6th Circuit deliberate ignorance instruction does not meet the NRC’s deliberate misconduct standard, and instead would be classified as careless disregard.”) (citing the Staff Motion for Collateral Estoppel at 23).

¹⁶ *Connors v. Tanoma Mining Co., Inc.*, 953 F.2d 682, 684 (D.C. Cir. 1992) (stating that if the basis of the prior decision is unclear “and it is thus uncertain whether the issue was actually and necessarily decided in that litigation, then relitigation of the issue is not precluded.”).

jury could have rendered its verdict, the Staff “disavowed” collateral estoppel. *See* Initial Decision at 42 n.76; 53; Tr. of Oral Argument at 2397. In the end, the Staff did not even brief collateral estoppel in its proposed Finding of Facts and Conclusions of Law to the Licensing Board.

Recognizing this, the Dissent attempts to salvage the argument by claiming that the Staff was mistaken. Dissent at 20. But the Dissent’s *ipse dixit* to the contrary cannot cure the fact that the Staff unequivocally said deliberate ignorance is insufficient to prove the knowledge component in the NRC’s deliberate misconduct standard. Neither is it cured by the Staff’s about-face now which is nothing more than an attempt to align itself with the dissenting judge’s view that the doctrine applies. Given the foregoing, the Staff’s Application should be rejected.

VI. **The Public Interest Does Not Warrant a Stay**

The Staff cannot show that the public interest will be harmed by the immediate enforcement of the Initial Decision. The Staff’s reference to the NRC’s “preeminent mission” of protecting the public health and safety is accurate but misapplied in this case, and its citation to a case regarding radioactive waste disposal is inflammatory and inapplicable to the issues here. Application at 9 n.34. There is no evidence that Mr. Geisen poses a threat to the public. It is undisputed that Mr. Geisen worked without incident for three years after the events at issue in this case. Decision at 5; Dissent at 66 n.52. Because there is nothing in the argument the Staff advanced that demonstrates how the public health and safety is being compromised, the Staff’s application for a stay of the order of the Board should be denied.

Respectfully submitted,

/s/

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Andrew T. Wise
MILLER & CHEVALIER CHARTERED
655 15th St, NW
Washington, DC 20005
Counsel for David Geisen

October 6, 2009

ATTACHMENT 1

Excerpt from Criminal Trial Sentencing Transcript

(with Board Memorandum and Order dated November 14, 2008
Paragraph 2, First and Second Sentences)

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

3 UNITED STATES OF AMERICA,) Docket No. 3:06CR712
4 Plaintiffs,) Toledo, Ohio
5 v.) May 1, 2008
6 DAVID GEISEN,) SENTENCING
7 Defendants.)

8 -----
9 TRANSCRIPT OF SENTENCING HEARING
10 BEFORE THE HONORABLE DAVID A. KATZ
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

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21 and

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23 U.S. Department of Justice
Criminal Division
3rd Floor
24 1400 New York Avenue, NW
Washington, DC 20005
25 (202) 514-0838

1 the fine and so did the government. I am not going to
2 change my order with respect to the three-year ban
3 coincidental with the three-year term of probation.
4 However, I point out to you and to Mr. Geisen and to the
5 government that that is not to say that if Mr. Geisen, for
6 instance, were to be reinstated by the NRC and had the
7 opportunity for reemployment that this court would not do
8 what it does in most cases, and that is the probation
9 officer, when he is requested or she is requested for a
10 change in the terms and conditions of probation must seek
11 the approval of The Court for that change. The Court would
12 then, in a case like this, hold a hearing to consider that
13 probation officer's request. Now, it may be the request of
14 the probation officer, or it may be a request of the
15 defendant probationer. But in either event, it comes to
16 this court. And at that time the decision will be made.
17 Not at this time except as noted subsequent to announcement
18 of the sentence originally, the sentence as originally
19 given but as amended shall be imposed immediately.

20 Mr. Geisen, it's my obligation to tell you that
21 you have the right to appeal your conviction if you believe
22 that there was some irregularity in your case or if you
23 believe there is other grounds for appeal. You also have
24 the right to appeal your sentence under certain
25 circumstances, particularly if you feel that the sentence I

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of
DAVID GEISEN

Docket No. IA-05-052-EA

ASLBP No. 06-845-01-EA

November 14, 2008

MEMORANDUM AND ORDER
(Regarding Witnesses and Exhibits)

As indicated in our November 3 Memorandum and Order, much was accomplished during the October 23 prehearing teleconference. Two matters touched on there deserve further attention during the ongoing accelerated preparations for the hearing.

1. Witnesses. If they have not already done so, the parties should set a mutually agreeable deadline (no later than Wednesday, December 3) for exchanging their final witness lists. The brief outlines of their presentations previously set for filing on December 3¹ should be accompanied (unless these items are available earlier) by (1) that final witness list and (2) the final version of the proposed joint stipulation (upon which, at last word, the parties had nearly reached agreement).

2. Exhibits. The Transcripts of the federal court criminal trial are proving valuable in the Board's preparation for the upcoming NRC hearing. The parties are encouraged to call our

¹ In that regard, with the last brief on the collateral estoppel question arriving Wednesday, November 26, it is unlikely that the Board will be able, prior to the Wednesday, December 3, due date of the outlines of their respective cases, to give the parties more than tentative guidance on how that principle will ultimately be applied (see also Nov. 3 Order at 3-4, referring to Tr. at 703-06, 730-31). Any such guidance is, therefore, not likely to affect the content of the outlines.

attention informally to any exhibits from the criminal trial that would similarly aid our preparation. The parties may provide us any such exhibits by (1) furnishing the ADAMS accession number; (2) transmitting them to us electronically; or (3) sending us a hard copy.

As to the Exhibits expected to become part of the NRC's evidentiary record, the Board wishes to proceed, as it has done in previous cases, in a two-stage fashion. The first stage involves our receiving on Wednesday, December 3, an electronic list of all of the party's proposed Exhibits, and courtesy copies of any Exhibits to which our attention has not previously been directed per one of the three options set out at the top of this page. If those Exhibits exist electronically, they are to be submitted to us² as such, each in a separate e-file, and in PDF format if available, so long as we are also furnished one hard copy – appropriately bound, and tabbed if necessary – of any complex Exhibit, containing on its first page an informal notation of the sponsoring party's name and the Exhibit number. If such Exhibits do not exist electronically, four such hard copies should be furnished.

Second, to avoid the delay incurred when evidentiary proceedings have to stop while the Court Reporter formally marks numerous exhibits for identification, all documentary exhibits intended to be utilized at the hearing should be formally pre-marked by their sponsor. For this purpose, the Board will provide to each party in the early part of Thanksgiving week a rubber stamp (layout appended hereto) that will reflect the case name and docket number, and provide space for the party to insert, before the hearing commences, its name ("Geisen," "Staff" or "Joint"); and the Exhibit # (starting with "1" in each of the three instances).³ (Other blanks on the stamp will be filled in by Board personnel, in the manner described in footnote 5, below, as the hearing progresses.)

² All e-submissions should be sent not only to the three Board members but also to our law clerk, Johanna Thibault.

³ The stamp imprint should be placed in the upper right-hand corner of the Exhibit if possible; if not, any location on the first page is acceptable.

ATTACHMENT 2

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

HEARING

In the Matter of: : Docket No. IA-050-052
DAVID GEISEN : ASLB No. 06-845-01-EA

Thursday,
December 11, 2008

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

BEFORE:

MICHAEL C. FARRAR, Administrative Judge, Chair

E. ROY HAWKENS, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

Neal R. Gross and Co., Inc.
202-234-4433

1 about 13RFO, and I'm talking about a modification
2 that's been in place since 1994. And I'm asking
3 whether that modification, which has been in place
4 since 1994, was there because you couldn't access the
5 entire head through the weep holes.

6 BY MS. CLARK:

7 Q And you knew that, didn't you?

8 JUDGE FARRAR: I thought he answered -

9 THE WITNESS: No.

10 JUDGE FARRAR: Wait. Your lawyer has an
11 objection. I thought he answered that at the time
12 you're talking about, he had the rover in mind.

13 MS. CLARK: I'm talking about what he knew
14 about the past inspections, and accessibility of the
15 head.

16 JUDGE FARRAR: We'll give you a little
17 more. Go ahead. Re-ask the question. And, Mr. Wise,
18 your objection is noted, but we're going to give a
19 little leeway here.

20 BY MS. CLARK:

21 Q So going back again, the modification --
22 you knew the modification had been in place since
23 1994. Correct?

24 A Correct.

25 Q To cut the access holes. And you knew the

1 access holes were being requested in that modification
2 because they couldn't get to the entire head using a
3 camera on a stick through a weep hole. Isn't that
4 correct?

5 A Correct.

6 Q So you knew that it was not possible to
7 see 100 percent of the head in 1996. Isn't that
8 correct?

9 A I would say that's correct the way that's
10 worded.

11 Q Thank you.

12 JUDGE FARRAR: Ms. Clark, if you're
13 shifting to a new subject, Mr. Geisen, was the
14 Regulatory Affairs person at the technical assistants
15 meeting?

16 THE WITNESS: Yes, Your Honor.

17 JUDGE FARRAR: What was the Regulatory
18 Affairs person's name?

19 THE WITNESS: Dave Lockwood.

20 JUDGE FARRAR: Ms. Clark, was he charged
21 by the Staff?

22 MS. CLARK: He was not.

23 JUDGE FARRAR: Okay.

24 JUDGE TRIKOUROS: He works for Worley?

25 THE WITNESS: That's correct, Your Honor.

1 MS. CLARK: Now we're on 2744. And that
2 is Staff Exhibit 13.

3 JUDGE FARRAR: Let me interrupt you for a
4 minute. Mr. Geisen, it's getting late in the day, and
5 while -- and this is not an easy ordeal, so from now
6 on if at any point you want to take a little break and
7 stretch or whatever, let us know.

8 THE WITNESS: I'm fine, Your Honor. Thank
9 you.

10 JUDGE FARRAR: The rest of us are
11 accustomed to this.

12 MS. CLARK: And you'll be happy to hear
13 I'm nearing the end.

14 JUDGE FARRAR: Oh, good. But at this time
15 of day, witnesses - well, particularly if you've been
16 there all day, tend to get tired, so put up your hand.
17 We'll take a little stretch in place and come back.
18 Go ahead, Ms. Clark.

19 MS. CLARK: 2744, that's Exhibit 13. And,
20 again, there is a nozzle table. And I will try to
21 make this brief.

22 BY MS. CLARK:

23 Q Going down to the note at the end, Mr.
24 Geisen, did you write that note?

25 A Correct. It was actually the same note as

ATTACHMENT 3

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

HEARING

In the Matter of: : Docket No. IA-050-052
DAVID GEISEN : ASLB No. 06-845-01-EA

Thursday,
December 11, 2008

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

BEFORE:

MICHAEL C. FARRAR, Administrative Judge, Chair

E. ROY HAWKENS, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

Neal R. Gross and Co., Inc.
202-234-4433

1 understood this. That Block 14 indicated that the
2 director or manager was supposed to perform the
3 technical review or was responsible for the technical
4 review? I think the answer was responsible for the
5 technical review, right?

6 THE WITNESS: It is the responsibility of
7 the director and management individual assigned the
8 task.

9 JUDGE TRIKOUROS: Was that you?

10 THE WITNESS: Well, that's a gray area
11 here because it was as we mentioned before the shotgun
12 approach. If you looked at the number of people on
13 here there are numerous director and management people
14 checked on here.

15 JUDGE TRIKOUROS: Right. So that's what
16 I'm asking is who of all of those people -- Do all of
17 them have that responsibility or does one of all of
18 them has that responsibility?

19 THE WITNESS: All of them have that
20 responsibility, sir.

21 JUDGE TRIKOUROS: All of them including
22 Guy Campbell.

23 THE WITNESS: That's correct. The way the
24 form is written every block that's checked under 14
25 that is a manager or director you would have to abide

1 by that block, that description on the backside that
2 says it's their responsibility.

3 JUDGE TRIKOUROS: And you were asked just
4 now that if even something that involved technical
5 areas that you had no knowledge in but that the work
6 was done by someone who worked for you who was an
7 expert in that area, what do you view your
8 responsibility was with respect to signing something
9 under those circumstances?

10 THE WITNESS: It's my responsibility to
11 verify the accuracy and it's not exactly stipulated
12 how I verify that accuracy. My way of verifying that
13 accuracy at that time was to verify that the
14 individuals that had that technical knowledge had
15 reviewed and approved this document.

16 JUDGE TRIKOUROS: And were there other
17 ways that might have been available to you?

18 THE WITNESS: I probably could have taken
19 the document and asked for the source document of
20 every single line item in there and done a
21 verification that way. I didn't do it that way.

22 JUDGE TRIKOUROS: Is that a practical
23 option with respect to every calculation and every
24 letter to the NRC and every document that flows across
25 your desk?

1 THE WITNESS: No, I don't believe it is.
2 But I mean there's an awful lot of leeway granted in
3 the description of Block 14 as to how you would
4 interpret that and that is the other end of the
5 extreme of how it could be interpreted.

6 JUDGE FARRAR: At Kewaunee, somebody does
7 that, but it's not all the people in Block 14, one of
8 them or someone like that.

9 THE WITNESS: Their form is different.

10 JUDGE FARRAR: Someone there gets assigned
11 checking out every --

12 THE WITNESS: That's correct, Your Honor.
13 They have actually a review and approval block that
14 falls below the technical reviewer block.

15 JUDGE FARRAR: Did I understand you in
16 response to Ms. Clark to indicate that even if people
17 below you who were knowledgeable had signed the green
18 sheet if you saw something that you knew that was
19 wrong, you would not sign it.

20 THE WITNESS: That's correct, Your Honor.

21 JUDGE FARRAR: Go ahead, Ms. Clark.

22 BY MS. CLARK:

23 Q Okay. Moving onto the Brian Sheron call,
24 I believe you said you were in an INPO exit meeting
25 when you got called out to hear about this phone call.

CERTIFICATE OF SERVICE

I hereby certify that, on the 6th day of October, 2009, true and genuine copies of the foregoing were served on the following persons by electronic mail and, as indicated with an (*), first class mail, postage prepaid:

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