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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	-	Docket No. 3:06-CR-712
	-	
Plaintiff,	-	Toledo, Ohio
	-	October 23, 2007
v.	-	Trial
	-	
DAVID GEISEN, et al.,	-	
	-	
Defendant.	-	

VOLUME 13 OF 15
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID A. KATZ
UNITED STATES DISTRICT JUDGE.

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Proceedings recorded by mechanical stenography, transcript
produced by notereading.

09:06:43 1 (Commenced at 9:20 a.m.)

09:20:31 2 THE COURT: Good morning, ladies and gentlemen. I

3 hope everybody had a nice long weekend. I've got what I

09:20:38 4 promised to have and continue to have.

09:20:40 5 Mr. Cook, you remain under oath. Please continue

09:20:44 6 cross.

09:20:46 7 - - -

09:20:46 8 RODNEY COOK, CROSS-EXAMINATION

9 BY MR. BALLANTINE:

10 Q. Good morning, Mr. Cook.

11 A. Good morning.

12 Q. Do you recall on Friday Mr. Conroy asked you about the

09:20:52 13 comments that the site vice-president made to the near final

09:20:56 14 version of Serial Letter 2731?

15 A. That is correct.

09:20:59 16 Q. Could you bring us up-to-date, just to refresh the

09:21:02 17 jury's recollection, of what went on there, what -- how did you

09:21:07 18 receive those comments?

19 A. I received those, my written comments, I believe by Mark

09:21:14 20 McLaughlin. There were several, about five or six comments,

21 several Mark said he was taking care of; the others he said,

22 hey, see what you can do with these. I went through that, made

09:21:24 23 what changes I could make to address Mr. Campbell's comments.

24 Came back to Mark, said: This is what I worked up. Then we

25 could go ahead and get back to Mr. Campbell's office for his

09:21:40 1 signature.

2 Q. Mr. Conroy asked you some questions about the as-left
09:21:44 3 condition of the reactor vessel head in 2000?

4 A. That's right.

5 Q. What was that comment about?

09:21:52 6 A. If I recall his question, it was: Can we be more
09:21:58 7 explicit about the head being cleaned in 2000? And I told Mark
8 no because Andrew had told me he left some boric acid up on the
9 head. None of it masking, but it was still not a pristine
10 head.

09:22:15 11 Q. I'm going to ask you to take a look at Government's
09:22:19 12 Exhibit 55, which has not been admitted. Do you recognize that
13 document? Are those, in fact, the comments we've been talking
14 about?

09:22:49 15 It may be helpful if you look at page 3 of 19 in
09:22:53 16 Attachment 1. Do you see a question about halfway down about
17 the as-left condition?

09:23:02 18 A. Yes, sir.

19 Q. So are those the comments that we've been referring to?

20 A. Yes, sir. These are they, yes.

09:23:08 21 MR. BALLANTINE: Your Honor, the government would
22 move to admit Government's Exhibit 55 and publish it to the
23 jury.

09:23:15 24 THE COURT: Any objections?

09:23:17 25 MR. CONROY: None.

09:23:19 1 THE COURT: 55 will be admitted, may be published
2 to the jury.

09:23:29 3 BY MR. BALLANTINE:

09:23:29 4 Q. So just to put us all in the same spot here. Over here
09:23:36 5 on the right-hand side here, this is the comment we were talking
6 about or you were talking about with Mr. Conroy back on Friday;
7 is that right?

8 A. That is correct.

9 Q. And that was the one where the answer that you all came
10 up with was to talk about preexisting -- that inspections will
11 not be compromised due to preexisting boric acid deposits in the
09:24:00 12 13th refueling outage?

13 A. That is correct.

14 Q. I'm going to talk about that a little later. But
15 before I do, what is the comment above that that reads: Was
09:24:09 16 this masked because of the other leakage?

09:24:12 17 A. Didn't address that question. That was something that
18 I think Mark was dealing with. Didn't do anything with that
09:24:18 19 question.

20 Q. What part of the bulletin response was Mr. McLaughlin
09:24:21 21 responsible for?

09:24:23 22 A. Mr. McLaughlin was responsible for -- well, he was the
23 one that took the response to Guy Campbell's office for Guy
24 Campbell to sign. He said, I'll take care of a lot of these.
25 Some of these he may have just handled right there with Guy

1 Campbell. I just did not address that question.

09:24:41 2 Q. Okay. Just to be -- to sort of back up a little bit.

3 This is the section --

09:24:51 4 Let me ask you this: What section of the bulletin
5 are we talking about right here? It's on the previous page.

09:24:58 6 A. This section of the bulletin is 1D; it's past
09:25:04 7 inspections.

8 Q. This was the part of the bulletin dealing with past
09:25:07 9 inspections?

10 A. That's correct.

09:25:09 11 Q. The specific statement is: No visible evidence of
09:25:13 12 nozzle leakage was detected.

13 Was that an important part of this response?

09:25:18 14 A. It's what engineering gave to me. You're asking me --
15 I'm not sure what context you're asking me that question.

09:25:27 16 Q. Well, the NRC was asking about the condition of the head
09:25:31 17 as it could be known at that point in time in the summer of
09:25:36 18 2001.

19 A. Asked the details of past inspections, yes.

20 Q. And this comment from Mr. Campbell was pretty on point,
09:25:44 21 wasn't it?

09:25:47 22 A. As I said, I did not address that comment.

23 Q. But this was something that you knew about from your
09:25:53 24 discussions with Mr. Goyal, right?

25 A. Remember, in dealing with this, no evidence of nozzle

1 leakage was present because they had reviewed and verified that
2 all the nozzles had downward flow from the CRDM flanges. That
3 is where they came to the conclusion that there was no evidence
09:26:14 4 of nozzle leakage.

09:26:16 5 Q. Right. But in the process of drafting this bulletin
09:26:22 6 response, Mr. Goyal had indicated to you that boric acid around
7 the nozzles had been an impediment to his doing inspections in
8 the past, right?

9 A. He said that that kept him from looking at the nozzles,
10 yes.

11 Q. And that's specifically what Mr. Campbell asked in this
09:26:38 12 part of the draft, right?

09:26:41 13 A. I understand what you're asking. I can't tell you what
14 Mr. Campbell was asking. Did not answer his question.

09:26:50 15 Q. But you knew the answer to question, right?

09:26:56 16 A. I knew that the answer -- I knew that the answer to that
17 question was no nozzle leakage was detected because all the
18 nozzle -- all the boron that they found was downward flow from
09:27:10 19 CRDM flanges. That was what engineering had been saying about
20 all of the boron that was on the head. No evidence of nozzle
09:27:18 21 leakage because of downward flow from CRDM flanges.

09:27:21 22 Q. Mr. Cook, I'd like you to take a look at Government's
09:27:24 23 Exhibit 52.

24 MR. BALLANTINE: Which has been admitted, Your
25 Honor. I'd like to display it to the jury.

1 BY MR. BALLANTINE:

09:27:32 2 Q. We discussed this before. It's an e-mail from Mr.
3 Goyal to you and copying a number of other people, and it's
09:27:39 4 dated August 27th. That's before Mr. Campbell did his review,
5 right?

09:27:44 6 A. Correct.

09:27:45 7 Q. And the highlighted part that Mr. Goyal -- the
09:27:51 8 highlighted section here in the e-mail says: Subsequent review
09:27:54 9 of 1998 and 2000 inspection videotape results. The discussion
10 here gives an impression to the reader that we were able to look
11 at all the CRDMs. It is very difficult to look at the CRDMs
12 when there is boric acid around it. Do we want to reword this?

09:28:13 13 So Mr. Goyal had told you that boric acid around
09:28:16 14 the nozzles masked those nozzles from inspection, right?

15 A. Mr. Goyal had explained to me that his inspection around
16 the nozzles, he could not see the head/nozzle interface. I
17 don't think that there's any denial that that's what they were
18 telling us. On this particular comment he said: The review --
19 the discussion we had and the past review of the video results
20 makes it sound like we can make a determination on that. Do we
21 want to reword this?

22 I went to engineering, gave them Prasoon's comment.
23 They said: No, what we have there is correct.

24 And that's why it stayed. Did this cause me any
09:29:02 25 discomfort? No, it didn't.

1 Q. And when Mr. Campbell raised the same point in his
09:29:07 2 comments, that didn't cause you any discomfort either?

3 A. No, it didn't.

09:29:14 4 Q. Also with respect to Mr. Campbell's comments, I'd like
5 to look at the previous page.

09:29:33 6 I'm going to continue to do this in Section 1D.

09:29:38 7 Here dealing again with the 1D question about past inspections,
8 I want to go down to this comment in about the middle of the
9 page here where he's talking about the RPV head insulation.

09:29:54 10 And it says: The minimum gap being at the dome center of the
09:29:59 11 RPV head where it is approximately two inches. And that gap
09:30:05 12 will not impede visual inspections.

13 "Will not" was the way Mr. Campbell got the draft,
14 right?

15 A. That's correct.

16 Q. So that's looking to the future?

17 A. Correct.

09:30:14 18 Q. And he asks: But does not? What was your understanding
19 of what that comment was about?

20 A. He was asking, did we change something, or are we
21 changing something? It says will not. Is it the same now?
22 All we can say is it's the same now. He said: Why is it not
23 in the future?

09:30:36 24 Q. Why was it not in future tense before?

25 A. We were asking it as a forward-looking question, the

09:30:42 1 impediments.

09:30:45 2 Q. Well, then why did you change it to present tense?

3 A. Because he asked a question that made sense. His
4 question was, are we changing something in the future? Is it
09:30:57 5 that way now? Yes, it is. Okay, then change it to present
09:31:01 6 tense.

7 Q. You said you were answering as a forward-looking
8 question. Was there a concern that the NRC would ask the same
9 question about whether this two-inch gap was an impediment in
10 the past?

09:31:18 11 A. Didn't view it as that. I viewed it as a question that
09:31:22 12 Guy Campbell had, is this a problem now? No, it's not; we can
13 change it to present as well.

09:31:30 14 Q. All right. At this point I guess I wanted to ask you
15 about your understanding of what the NRC's review of these kinds
16 of documents is once one's submitted. What is it that you
17 understand the NRC to be doing when they get a bulletin response
18 or some other kind of submission to headquarters in this case?

09:32:00 19 A. I'm sure that the staff, NRC staff, will have their
09:32:08 20 people review it and go ahead and make some decision based on it
21 or try to make a decision based on it, yes.

22 Q. And on Friday you talked about when, Mr. Conroy had
23 asked some questions, asked about situations that begged the
24 question of the NRC. Do you remember that testimony?

25 A. Yes.

1 Q. And what is the -- what is your understanding of the
09:32:33 2 question begging with respect to someone in the NRC?

3 A. There are certain phrases you put in a letter, and it's
4 just -- it's widely known just certain catch phrases will always
5 beg a question. "Majority" is one of those; what is a
6 majority.

7 Q. So let me ask you this: We talked about the technique
8 issue and that you interacted with Mr. Goyal about this past
09:33:04 9 technique. If in the submittal Davis-Besse had said the
10 technique of inspection for the weep holes used in 1998 and 2000
11 prevented Davis-Besse from accessing all the nozzles, would that
12 have begged the question of the NRC?

13 A. Would you read that again, please?

14 Q. Sure. If the submittal had said the technique of
09:33:28 15 inspection through weep holes used by Davis-Besse in 1998 and
16 2000 prevented Davis-Besse from accessing all the nozzles, would
17 that have begged the question?

09:33:44 18 A. I don't know.

09:33:46 19 Q. That's a true statement, isn't it?

20 A. It probably -- yes, it is, it's probably a true
21 statement.

22 Q. And if the submittal had said that at the same time
23 there were nozzles with boric acid around them that could not be
09:34:01 24 inspected, would that have begged the question of the NRC?

09:34:05 25 A. I don't know that it would have begged the question of

09:34:08 1 the NRC. It would have been stating a fact, yes.

2 Q. And what do you think NRC's reaction would have been if
3 those facts had been in Serial Letter 2731?

09:34:18 4 A. I don't know.

09:34:23 5 Q. When did the bulletin response period end for you?

09:34:29 6 A. You mean through all of it -- through every one of the
09:34:35 7 submittals?

8 Q. Well, I guess I'm trying to understand your frame of
9 mind. Was there a different -- did you have a different
10 version of a bulletin response period, then a supplemental
11 response period?

12 A. I never anticipated a supplemental response. I knew
13 that we had a bulletin response; bulletin response ended. The
09:34:55 14 bulletin response ended -- I'm not going to say it ended on the
15 4th because we had commitments, the commitment management
09:35:07 16 system, and so we had to enter those. So it was probably the
09:35:12 17 5th or 6th that I figured I was finished with the bulletin
18 response.

19 Q. I asked -- I want to make sure I understood your
20 testimony on Friday, and wanted to make sure that we were all on
21 the same page. When you said that you saw no videos during the
22 bulletin response period, what period were you talking about?

09:35:34 23 Were you talking about that August period, or were you talking
24 about --

25 A. I saw no videos until the AIT asked and we provided -- I

09:35:43 1 saw videos on November 8th when we went to D.C. I saw no
2 further -- no further videos until we got them from the AIT.

09:35:52 3 Q. Did you go to D.C.?

4 A. No, I didn't.

5 Q. At all?

6 A. No.

09:35:57 7 Q. I take it your response would be the same with respect
8 to PCAQs, specifically 96-551?

09:36:03 9 A. That is correct.

10 Q. And that is that you did not see PCAQ 96-551 until when?

11 A. Until we were collecting information for the AIT in the
12 spring of 2002.

13 Q. So the bulletin response period for that purpose extends
09:36:20 14 throughout the fall of 2001?

09:36:22 15 A. After the bulletin went out, I was going back to doing
16 what I was doing before the bulletin came about.

17 Q. I just want to make sure you're not distinguishing
09:36:32 18 between those periods of time when you say you saw no videos,
19 you saw no PCAQs.

20 A. No.

21 Q. At this point I'd like to turn to the supplemental
22 response, Serial Letter 2735.

23 A. Yes, sir.

24 Q. What was your involvement in preparing that?

09:36:48 25 A. I was on a phone call the 3rd. I heard what the NRC

09:36:55 1 wanted. We -- assignments were made about who would provide
09:37:01 2 what for that letter. About the 8th I started getting some
09:37:06 3 information, started trying to put that letter together.

4 Q. All right. In your testimony on Friday I think you
5 said that you were just expounding or expanding on information
09:37:17 6 given in 2731, that there was no different information in 2735.

09:37:21 7 A. There wasn't. All it was was the engineering was
8 giving us further information on what the inspection said.
9 That's all the letter -- that's all the NRC asked for. That's
09:37:32 10 all we were given.

11 Q. Well, 2735 talked about nozzles that couldn't be seen
12 due to boric acid on the head, right?

09:37:40 13 A. I don't think that 2731 tried to hide that fact either.
14 It does say that boric acid was scattered across the head, and
15 there were lumps of boron. I don't think there was anything
16 that said that -- that gave anybody the impression that, oh,
17 every nozzle could be seen. And the NRC didn't seem to be
09:38:03 18 surprised about that as well on October 3rd.

19 Q. Well, please show me where in Serial Letter 2731, that's
20 Government's Exhibit 60, there's an indication that there were
09:38:15 21 nozzles that could not be seen due to boric acid around the
22 head.

23 A. I can't show you that.

24 Q. Okay. But your testimony was that it had that kind of
25 information in it?

1 A. The testimony states that the information was there,
2 that that conclusion could be drawn, yes.

09:38:29 3 Q. The conclusion could be drawn that there was boric acid?

4 A. Could be drawn that boric acid was there and that it
5 could be hiding behind nozzles, yes.

6 Q. Mr. Cook, are you familiar with an e-mail from the NRC
09:38:47 7 indicating that they'd heard good things about your 100 percent
8 inspection in 2000?

9 A. Yes.

10 Q. So, in fact, the NRC thought that based on 2731 there
11 had been a 100 percent inspection in 2000, right?

09:39:04 12 A. I think if you could go ahead and also extend that, the
13 answer to that was Dale Wuokko, that was -- commonly came from
09:39:13 14 Dale Pickett. Dale Wuokko said he's in error. When he gets
15 our letter, he will understand what we mean.

16 Q. We're talking about 2731 and what information was
17 conveyed in that. I think you said that information wasn't --
09:39:25 18 the conclusion could be drawn that the nozzles were blocked.

19 A. Okay. That comment was made after we had the October
20 3rd phone call. Otherwise Dale Wuokko couldn't say when the CR
21 2735, he'll get that cleared up. So this was after the October
09:39:44 22 3rd phone call.

23 Q. So it was in the October 3rd phone call that Davis-Besse
09:39:48 24 expressed that they had a complete inspection of the 2000 --

25 A. It was sometime -- it was explained to them that we had

1 a clean head after the 2000 refueling outage. Doug Pickett,
2 having "as found," "as left" confused, that's -- that was my
09:40:07 3 understanding, that he had the "as found," "as left" confused.
4 As left we had a clean head, and we did a -- they had a 100
5 percent inspection, yes.

09:40:39 6 Q. What was it that was being transmitted in -- to the NRC
7 through Serial Letter 2735?

09:40:47 8 A. 2735 was -- 2735 we expounded upon the response we gave
9 him in 2731 per the request of October 3rd.

09:41:05 10 Q. And specifically what information were you sending
11 along?

12 A. We were sending information concerning past inspections.

09:41:12 13 Q. What was your understanding at the time of what an
09:41:16 14 indication of a nozzle crack would look like in a visual
09:41:20 15 inspection?

09:41:22 16 A. My understanding of an indication, an indication of a
09:41:31 17 circumferential crack would be popcorn boron at the nozzle head
18 interface.

19 Q. And you had a pretty good idea of what that looked like?

20 A. Yes.

21 Q. Because I'm going to show the jury Government's Exhibit
22 82 which has been admitted. This was an e-mail that went out to
23 everybody basically with a photo of the Crystal River vessel
24 head penetration indication; is that right?

25 A. Yes.

1 Q. Then I'm going to bring up the photograph just so we're
2 all on the same page. That's what we're talking about when
3 we're talking about popcorn boron?

4 A. That's correct.

5 Q. So in 2735 you said they were expanding on this
6 information. What specifically was being provided to the NRC?
7 What was the expanded information?

8 A. One of the items that the NRC asked for in the October
9 3rd phone call was nozzle-by-nozzle inspection details from each
09:42:25 10 one of the inspections.

09:42:27 11 Q. And that was being produced during this period, these
09:42:30 12 nine days?

09:42:31 13 A. That is correct.

09:42:33 14 Q. Was there any concern about the way those past
09:42:44 15 inspections had been done that was circulating among those folks
16 who were working on this bulletin response?

09:42:51 17 A. I'm not sure I understand your question. I mean, I
09:42:55 18 can't answer that question. I don't know.

19 Q. How was it that the nozzle-by-nozzle table was being put
20 together to your knowledge?

21 A. To my knowledge, engineering was putting that together.

22 Q. And were they coming up with any problems with respect
09:43:08 23 to matching up each nozzle?

09:43:12 24 A. I don't know.

09:43:16 25 MR. BALLANTINE: Your Honor, I'd like to mark as

1 Government's Exhibit 162 a document. Counsel, it's been
09:43:23 2 provided to us as Defense Exhibit 30 previously marked.
09:43:28 3 THE COURT: 162?
09:43:30 4 MR. BALLANTINE: I think that's the next number,
5 Your Honor.
09:43:32 6 THE COURT: Yes.
09:43:36 7 BY MR. BALLANTINE:
8 Q. Mr. Cook, I'd ask you to have a look at that, please.
09:43:41 9 Do you recognize that document?
09:43:54 10 A. Yes, I do.
11 Q. What is that document?
09:43:59 12 A. I'm transmitting a copy of the latest draft of 2735.
09:44:07 13 Dale Wuokko and Dale Miller saying, okay, this incorporates more
14 information on the visuals. Of course, we're not talking about
15 the lack of video on the good nozzles yet. And it incorporates
09:44:21 16 information from the SIA report.
09:44:23 17 MR. BALLANTINE: And it's that -- I'm sorry.
18 And, Your Honor, I move to admit Government's
19 Exhibit 162, please.
09:44:33 20 MR. CONROY: No objection.
21 THE COURT: It will be admitted without objection.
09:44:37 22 It may be displayed to the jury.
09:44:42 23 BY MR. BALLANTINE:
09:44:42 24 Q. Do I have that document up on the document camera, Mr.
25 Cook?

1 A. Yes, you do.

09:44:47 2 Q. I'm just going to zoom in here. I'd like to talk about
09:44:51 3 the parenthetical where it says -- well, this incorporates some
09:44:58 4 other information on the visual inspections, then there's a
09:45:01 5 parenthetical, "not the lack of vimeo" -- I assume that means
6 video?

09:45:06 7 A. That's correct.

8 Q. "Not the lack of video on the good nozzles yet, though."
09:45:13 9 Please tell the jury what the issue of a lack of
10 video on the good nozzles relates to.

09:45:19 11 A. That issue was that I had heard, someone had told me, it
12 may have been Andrew; I don't know who it was -- somebody had
09:45:32 13 told me whenever we're looking at these nozzles, and we're
14 looking at the videos, if there was a good nozzle, they did not
09:45:40 15 videotape it. They only videoed the nozzles that had boric
16 acid around them.

09:45:45 17 Q. What was your understanding of the way they were doing
09:45:48 18 these inspection, how these head inspections were done?

09:45:52 19 A. They put a camera under the insulation and sat there and
09:45:59 20 videotaped.

09:46:02 21 Q. And was there any other component of it? Were people
09:46:07 22 putting their eyes up to those weep holes?

23 A. I don't think so.

24 Q. So the entire inspection was done with a camera, right?

09:46:14 25 A. It was.

1 Q. And what was your understanding of what Mr. Siemaszko
2 was saying when he was saying they weren't videotaping good
3 nozzles?

09:46:26 4 A. I know that there was a cable that ran for -- my
5 understanding is there was a cable that runs from the camera
09:46:32 6 back to the video cassette machine. It could be that they
7 didn't click on the record until they got a bad nozzle. I
8 don't know. That is the information that he gave me.

9 Q. Did that make any sense at all to you?

09:46:44 10 A. It was the information that he gave me. It would have
11 made more sense to me to just keep the video machine on during
12 the whole inspection, but I didn't do the inspections; I wasn't
13 there.

09:46:59 14 Q. Was it your understanding that that's the way the
09:47:02 15 inspections had been done in 1998 as well?

16 A. I don't know how they did the inspections. I wasn't
17 there.

09:47:08 18 Q. So it didn't make sense to do it in 2000 when Mr.
19 Siemaszko did it that way. Did Mr. Siemaszko do the 1998
09:47:16 20 inspection?

21 A. No, he did not.

22 Q. So did you talk to the person who did the 1998
23 inspection to understand what it meant to visually inspect a
24 good nozzle but not record it?

25 A. No, I did not.

09:47:28 1 Q. And then the results were these tables, right? The
2 result of this nozzle-by-nozzle inspection that Mr. Siemaszko
3 did, or reinspection of the videos?
4 A. That's correct.

09:47:46 5 Q. I'm just going to bring that up. This is Government's
6 Exhibit 105, which has been previously admitted. I'm bringing
7 up page 1 of 2 of Attachment 2. I'd like to at this point
09:48:05 8 focus on a different part of this table than we've been looking
09:48:09 9 at. This part here with respect to the 1998 and 2000
09:48:18 10 inspection results, there's indications here that, like here, no
11 leak recorded. Is that what we're talking about?

09:48:35 12 A. I don't know.

09:48:44 13 Q. I'm going to bring up the next page and look at --
09:48:49 14 beneath the note that we've been focusing on so much, I'd also
09:48:53 15 like to take a look at this indication down here where it says
16 no leak recorded -- no leak observed. Is visual inspection
09:49:05 17 satisfactory? No video record required. Is that what we're
18 talking about?

09:49:12 19 A. That's the way that he indicated this, yes.

09:49:30 20 Q. Back on Friday we spoke briefly about Government's
09:49:51 21 Exhibit 89. Actually, that's the one that -- do you have that
09:50:06 22 there?

09:50:26 23 MR. BALLANTINE: I believe this exhibit's been
09:50:29 24 admitted. I wanted to bring us back up to where we were on
25 that on Friday. It's Government's Exhibit 89, Your Honor.

09:50:38 1 THE COURT: Yes, it has.

09:50:41 2 BY MR. BALLANTINE:

09:50:41 3 Q. Mr. Cook, I want to put this up on the document camera
09:50:45 4 so it's all on the same page. This was an e-mail from you to
5 Mr. Wuokko regarding Serial Letter 2735; is that right?

09:50:56 6 A. Yes.

7 Q. I think you testified about this draft. And
09:51:02 8 specifically you testified about this last page. Maybe I
9 should lead up to it by starting at the bottom of the previous
10 page where it says: As stated in the telephone conversation, no
11 leakage attributable to circumferential cracks has been observed
09:51:24 12 in areas from any of the inspections conducted by other
09:51:27 13 utilities and is not considered to be the most likely source for
09:51:33 14 leakage at Davis-Besse. In addition, these particular nozzles
09:51:39 15 had been planned to be examined by supplemental examination
09:51:42 16 during 13 RFO because of the masking boric acid crystal deposits
17 which are present around the nozzle/penetration interface.

09:51:53 18 Do you remember talking about that?

09:51:56 19 A. Yes, sir.

09:52:05 20 Q. At this point in time you understood there were masking
21 deposits left on the head of the reactor at the end of 2000 RFO,
22 right?

23 A. No.

24 Q. Then why did you write that?

25 A. I didn't write that.

09:52:16 1 Q. Who wrote it?

2 A. Dale Wuokko.

3 Q. Dale Wuokko wrote that?

4 A. Yes, he did.

5 Q. What understanding -- did you talk to him about it?

09:52:27 6 A. It was e-mails back and forth. He wanted a summary of

7 the letter at the beginning of the attachment. He wrote that.

8 He gave that to me.

9 Q. Did you discuss that part of it with him?

09:52:39 10 A. No, I didn't.

09:52:46 11 Q. Did Mr. Siemaszko -- he was producing material for 2735,

12 right?

13 A. He was being very -- yes, he was producing a lot.

09:52:57 14 Q. And one of the things he produced was a draft

09:53:10 15 description of the past inspections; is that right?

09:53:14 16 A. Yes.

09:53:36 17 MR. BALLANTINE: Your Honor, I'm not certain if

18 Government's Exhibit 97 has been admitted.

09:53:44 19 THE COURT: Yes, it was admitted on the 11th.

09:53:47 20 MR. BALLANTINE: Thank you.

09:53:50 21 BY MR. BALLANTINE:

09:53:50 22 Q. Mr. Cook, I'll hand you a hard copy if you prefer to

23 follow along on this. I'll put it up on the display. Do you

09:53:59 24 recognize Government's Exhibit 97 to be that summary that Mr.

09:54:03 25 Siemaszko produced?

1 A. Yes.

09:54:06 2 Q. I'd like you to look at the description that he

3 produced. I guess it's two or three pages in there, the big

09:54:14 4 block text. I have it up on the screen.

5 A. Okay.

09:54:21 6 Q. And down at the very bottom he's talking about the past

09:54:31 7 inspections, right? Is that right?

8 A. Yes.

9 Q. I'm sorry, down here at the very bottom.

09:54:45 10 A. Yes.

11 Q. He's talking about past inspections; is that right?

09:54:48 12 A. Yes.

13 Q. And I'm going to highlight some text. It says: This

14 area, along with a majority of the reactor head surface, was

15 cleaned in 2000 to provide a baseline for further inspections in

16 future outages.

17 A. Yes, sir.

18 Q. What did you understand that to mean?

09:55:07 19 A. That he cleaned as much of the head as he could. I

09:55:11 20 understand he didn't have a pristine head. He didn't clean

09:55:16 21 part of the boric acid at the top. He cleaned the majority of

22 the head.

23 Q. Is that what your understanding was when he talked to

24 you about this with respect to 2731?

09:55:25 25 A. That is exactly what I understood that he was talking

09:55:29 1 about.

2 Q. A majority of the head?

3 A. Majority of the head. He had left boric acid up around

09:55:33 4 the top four nozzles in between the nozzles. Nothing that

09:55:38 5 masked those nozzles.

6 Q. These four nozzles out of 69?

7 A. That's correct.

09:55:44 8 Q. And that is saying he cleaned a majority of the head?

09:55:47 9 A. Another one of these "majorities." What does a majority

09:55:53 10 mean?

11 Q. Well, you'd been through this when you talked to people

12 with respect to 2731, right?

13 A. I agree.

09:55:58 14 Q. Majority could mean 51 percent of the head?

09:56:01 15 A. Yes.

16 Q. Did you discuss this with Mr. Siemaszko?

17 A. No, I didn't.

18 Q. In fact, at this point in time you knew that boric acid

09:56:07 19 deposits had been left on the head that would block a future

09:56:11 20 inspection, right?

21 A. No, I didn't.

09:56:24 22 MR. BALLANTINE: I'd like to turn now to

09:56:28 23 Government's Exhibit 107, which I believe has been admitted,

24 Your Honor.

09:56:41 25 BY MR. BALLANTINE:

09:56:41 1 Q. I'm moving forward now to your work on Serial Letter
09:56:45 2 2741. This is a document that your counsel asked you about.
09:56:52 3 Do you see that up on the screen there?
09:56:56 4 A. Yes.
09:57:15 5 Q. This is a document that transmitted those draft
6 responses to the request for additional information that you had
7 been assigned, right?
8 A. Yes.
09:57:22 9 Q. And I'm going to turn to the next page. That page
10 starts out with letters BR-1, right? BR-1?
11 A. Yes.
12 Q. So that's the question the NRC is asking for detail
09:57:44 13 about the -- it's asking for detail about the past inspections?
09:57:54 14 A. That is correct.
09:57:55 15 Q. And your testimony on Friday was that you just answered
09:57:59 16 a different question, got mixed up in your head?
17 A. Yes.
18 Q. I'd like to look at that answer and zoom in on that.
19 That answer is in three paragraphs, right?
09:58:15 20 A. That is correct.
09:58:16 21 Q. All right. The second paragraph is about past
09:58:20 22 inspections, isn't it?
23 A. Correct.
24 Q. And it says that the videotapes of the past inspections
25 have been rereviewed. It talks about essentially the same

1 information that had been sent to NRC in the past?

2 A. It states I stated in 2731 and 2735. So yes, it was

09:58:39

3 submitted to the NRC.

4 Q. You were answering the question about the past, weren't
5 you?

09:58:43

6 A. Was reiterating what we had stated in 2731 and 2735.

7 Q. Well, why would you be answering that if the response
8 you thought you were giving had to do with future inspections?

09:58:56

9 A. Because if you look up in the first paragraph, it talks
10 about there are areas that are not viewable because of -- that
11 is future inspections. That's not a past inspection.

12 Q. Well, since you mention it, let's get to that. Why did
13 you say that there were areas that were not viewable?

14 A. Because Mark and I, before we had started working on
15 these responses, he and I were talking about future inspections.

09:59:19

16 I read the question funny. I wrote a screwy response. And
17 that's all I can tell you, Tom. It was a screwy response.

18 Q. You knew at this time that there was boric acid that
19 would mask the future inspections?

09:59:31

20 A. No, I did not.

21 Q. But that's what you wrote?

22 A. If you read this, it says: As stated in 2735, there are
23 areas that are masked. 2735 does not say that.

09:59:40

09:59:44 24 Q. And you were involved in preparing 2735?

25 A. Yes.

1 Q. So were you -- what did you do to prepare this response?

09:59:55 2 A. What did I do to prepare this response? I was going
10:00:00 3 from memory too, and I was writing this down. And, Tom, it
4 changed before the letter went out to the right response.

5 Q. It changed from what we now know to be an accurate
10:00:11 6 statement of the condition of the head at the end of 2000 to
10:00:14 7 what amounted to a response which was inaccurate?

8 A. That fact may be true. But this statement is wrong.
10:00:21 9 2735 does not say that.

10:00:24 10 Q. Third paragraph. It indicates photographs of the
10:00:29 11 nozzles from the inspections will be provided in the October 24,
10:00:33 12 2001 meeting at the NRC offices. So that's providing more
13 detail to the NRC about past inspections, right?

10:00:42 14 A. That is correct. Whenever this went out, that statement
15 got changed too because we weren't taking those on the 24th.

10:00:48 16 Q. Well, had Davis-Besse committed to provide the NRC with
10:00:53 17 video of past inspections by October 24th?

10:01:01 18 A. We had stated that we would provide them pictures of
19 past inspections. We were to provide them photographs of past
10:01:12 20 inspections.

21 Q. You were here when Mr. Huston testified, weren't you?

22 A. Yes.

23 Q. Do you recall him testifying that the NRC was not happy
24 that they hadn't gotten the video yet on the occasion of the
25 October 24th meeting?

1 A. I don't recall him saying that, but I wouldn't be
2 surprised. I don't know. I wasn't there at that meeting.

10:01:29 3 Q. Do you recall him testifying that Davis-Besse had made a
10:01:33 4 commitment to provide the NRC with that video prior to the
5 October 24th meeting?

10:01:41 6 A. That's probably so.

7 Q. In fact, Mr. Cook, you saw that video around the time of
8 October 24th, didn't you?

9 A. No, I didn't. I saw that video the day Dave Geisen and
10:01:54 10 everybody else went to D.C. to show them to the NRC. I got
11 those from his secretary the day that they -- Dave had left to
12 go to D.C.

13 Q. So you got them from his secretary when they prepared
14 those videos to take to the NRC?

15 A. Those videos were being digitized, and whatever
10:02:13 16 digitization that was being taken care of at that point. I did
10:02:16 17 not get those until they had -- on November 8th when they were
18 going to the NRC.

10:02:23 19 Q. In all of your prior interviews and testimony regarding
10:02:28 20 this issue, you said that the time that that happened, that the
10:02:34 21 videos were taken to NRC was on October 24th, didn't you?

10:02:37 22 A. That's correct.

23 Q. How is it now that you think it's November 8th?

24 A. Because November 8th is the right date. Originally it
10:02:44 25 may have been the 24th. I don't know why I said the 24th, Tom.

1 When I said that, it was two years after this had happened.

2 What can I tell you?

3 Q. And now it's five years after this has happened and your
4 memory's gotten better?

5 A. Tom, if you look at my responses, it says October 24th,
6 the day we took the videos to the NRC to show them. So if the
7 24th is wrong, the 24th may be a wrong date. But the event is
10:03:09 8 the right date, which was November 8th.

9 Q. In fact, Davis-Besse had committed to provide the NRC
10 with that video in early October, which is when you saw it?

11 A. That may have been so.

10:03:30 12 MR. BALLANTINE: Let me just have a moment, Your
10:03:30 13 Honor.

10:04:03 14 BY MR. BALLANTINE:

10:04:03 15 Q. Mr. Cook, when you were on-site at Davis-Besse, where
10:04:07 16 would you live?

10:04:11 17 A. You want to know where my apartment was? Is that what
10:04:15 18 you're asking?

19 Q. I don't want a specific address, but the general area
20 around Oak Harbor?

21 A. About 20 miles away.

22 Q. When you worked on-site, you were concerned about safety
23 at the plant, right?

24 A. Of course.

10:04:27 25 Q. And you were familiar with the potential for boric acid

10:04:33 1 corrosion of carbon steel components, weren't you?

2 A. I've known that there was a generic letter in '85. I
3 knew there was a further one in '97. Did I know details? No.
4 I know boric acid is corrosive, yes.

5 Q. I mean, you worked on that licensee event report that we
6 talked about on Friday, right?

10:04:53 7 A. I worked on where they had put the wrong components back
8 in place.

9 Q. Carbon steel nuts that dissolved away?

10 A. Yes.

11 Q. Setting aside for the moment how much boric acid had
12 been left on the head at the end of 2000, you were concerned
13 about whether that was an issue, a safety issue for the plant,
10:05:14 14 weren't you, during the bulletin response period?

10:05:19 15 A. When I was talking with Andrew and Prasoon during the
16 initial -- during the initial information that they gave me
17 during those past inspections, any boric acid that was left on
18 the head that they did not get off or what Prasoon left on the
19 head, he said it's dry boric acid; it's not a concern. And
10:05:44 20 everybody in the industry knows that, dry boric acid is not a
10:05:47 21 corrosive concern.

10:05:48 22 Q. Did you know that going in, that dry boric acid was
10:05:55 23 somehow not corrosive?

10:05:59 24 A. You've got to add water to boric acid to have corrosion,
25 yes. That's how you get boric acid.

1 Q. And these EPRI documents, were those just things that
2 you were just browsing?

3 A. Didn't browse them. This is something that -- this is
4 something that Prasoon told me. I didn't look at the EPRI
10:06:17 5 documents, no.

6 Q. In fact, when Prasoon told you that the boric acid on
7 the head was not a concern, he showed you PCAQ 96-551, didn't
10:06:29 8 he?

10:06:29 9 A. He told me -- no, I didn't see the PCAQ.

10 Q. In your interviews with the OI you said that in October
11 or November you know you saw PCAQ 96-551, didn't you?

10:06:41 12 A. I corrected myself. I said, I'm sorry, that's not
13 right; it wasn't until the spring.

10:06:58 14 Q. So you satisfied yourself the plant was safe to operate?

15 A. Listen, the engineers were just as concerned about the
10:07:04 16 safety of the plant as I am. They're giving me the information
17 that they have. They had satisfied themselves in the past that
18 it was okay to leave boric acid on the head.

10:07:13 19 Q. And so knowing that -- well, and what was the -- your
20 understanding of the safety of the plant with respect to nozzle
21 cracking?

10:07:22 22 A. I knew that the nozzle cracking issue was a new
10:07:27 23 phenomenon of circumferential cracking. I knew there was an
24 issue there. I also knew that it was a highly unlikely issue
10:07:38 25 to get to a situation where we would eject a nozzle as they had

1 talked about.

10:07:43 2 Q. So you were satisfied that wasn't going to be a problem
3 either?

4 A. I was satisfied that it was highly unlikely we would see
5 anything like that. No other plant had seen anything like that
6 as well of where they had an eminent nozzle ejection situation.

7 Q. So based on that understanding, you decided that it was
8 none of the NRC's business what the past inspections at
9 Davis-Besse had been like, didn't you?

10 A. No, that is not correct, Tom.

10:08:10 11 Q. When you submitted documents to NRC Office of
10:08:14 12 Investigation about your purchase order, you decided it was none
13 of their business what you made, how much money you made, right?

10:08:20 14 A. That's a whole different issue.

10:08:25 15 MR. BALLANTINE: Your Honor, I have no further
10:08:27 16 questions.

17 THE COURT: Redirect?

10:08:29 18 MR. CONROY: Can I just have a minute, Your Honor?

19 THE COURT: Of course.

10:08:47 20 (Discussion had off the record.)

10:08:47 21 MR. CONROY: No redirect, Your Honor.

10:08:53 22 THE COURT: You may step down, sir.

10:09:11 23 MR. HIBEY: Your Honor, subject to the moving of
10:09:14 24 exhibits, the defense for Mr. Geisen rests.

10:09:18 25 THE COURT: Thank you.

10:09:19 1 MR. CONROY: Likewise for Mr. Cook, Your Honor.

2 THE COURT: Thank you.

10:09:22 3 MR. BALLANTINE: Your Honor, the government has one

10:09:24 4 rebuttal witness. He may be downstairs in the basement. This

5 might be a good time to take a short morning break, and we'll

6 bring him right up.

10:09:35 7 MR. CONROY: Your Honor, we do have an issue with

8 this witness. This might be a good time.

9 THE COURT: Ladies and gentlemen, we'll take a

10 break now. Please remember my previous admonition to you not

11 to discuss this case among yourselves nor with anyone else, nor

12 permit anyone to discuss it with you, and please do not make up

13 your mind on the ultimate issues to be decided by you when you

14 retire at the end of the case. We'll be at rest 10 to 20

15 minutes.

10:10:51 16 (The jury is excused.)

10:11:15 17 THE COURT: The next witness is?

10:11:18 18 MR. BALLANTINE: Randy Rossomme, R-o-s-s-o-m-m-e.

10:11:29 19 MR. BALLANTINE: Just one moment.

10:11:33 20 MR. HIBEY: Two S's, two M's.

10:11:38 21 MR. WISE: Before we discuss Mr. Rossomme, we would

10:11:41 22 renew our motion for judgment of acquittal and rest on the

23 previous submittals.

10:11:46 24 MR. CONROY: Likewise, Your Honor.

10:11:48 25 THE COURT: Very good.

10:11:53 1 MR. CONROY: With regard to Mr. Rossomme, Your
2 Honor, I believe that we're about to hear from a witness who
3 wishes to testify in order to impeach Mr. Cook from past
4 recollection recorded. This evidence would not qualify under
5 Rule 801; and, therefore, I believe that this witness does not
6 have legitimate testimony to proffer.

10:12:27 7 MR. BALLANTINE: Mr. Rossomme did interview Mr.
8 Cook and a number of other people after the cavity was
10:12:35 9 discovered. His interviews -- he recorded the interviews, took
10:12:40 10 notes of the interviews on a laptop computer while they were
11 going on. His testimony is that he doesn't remember words that
10:12:50 12 were said in the interviews without looking at his notes and
13 reviewing them. Our intention is to put him on the stand, ask
14 him some questions, see if his notes refresh his recollection,
10:13:03 15 and if they don't, ask him further questions with respect to
16 past recollection recorded and ask that he be permitted to read
17 from those notes which he took at the time of the interview and
18 that he was making an accurate record of what was being said.
19 He will certainly concede that he was paraphrasing and that
10:13:22 20 these were not transcripts, but one way or another, Your Honor,
21 this man's testimony about what Mr. Cook told him is relevant,
10:13:30 22 and the jury should hear it.

10:13:32 23 MR. CONROY: Your Honor, the evidence might be
10:13:34 24 helpful in the government's view of this case. But it has to
10:13:39 25 be received now for the purposes of impeachment of Mr. Cook.

10:13:45 1 And if it is, as it must be, impeachment testimony, it is not
10:13:50 2 allowed by Rule 801(d)(1). And that, it seems to me, is beyond
3 equivocation. Rule 801(d)(1) says that the declarant testifies
4 at trial or hearing is subject to cross-examination concerning
5 the statement. And the statement is -- and this is -- we're
10:14:10 6 talking about what Mr. Rossomme's done now. The statement is
10:14:14 7 inconsistent with the declarant's testimony and was given under
10:14:18 8 oath subject to the penalty of perjury at a trial, hearing, or
9 other proceeding or in a deposition. That is legitimate
10:14:28 10 impeachment testimony under 801, and they do not have it to
10:14:32 11 offer.

10:14:40 12 MR. BALLANTINE: Your Honor, we're offering the
10:14:43 13 facts as impeachment that Mr. Rossomme heard Mr. Cook say, for
14 instance, that he saw the videos of these past inspections in
10:14:55 15 early October of 2001. Mr. Rossomme's notes reflect that. We
16 will put him on the stand, ask him those questions. If he
10:15:06 17 doesn't -- if looking at his notes doesn't refresh his
10:15:10 18 recollection, we'll ask him whether he took those notes
10:15:14 19 accurately and if he took them near in time to the statements
20 that were offered. He'll say yes. And then we'll ask him to
21 read from those notes.

10:15:24 22 MR. CONROY: The reason, Your Honor, that the rule
23 is written the way it is written, as I understand it, is to
24 avoid the inherent untrustworthiness in having somebody come in
10:15:35 25 and testify years later from notes of an interview which he

10:15:39 1 completely disavows as being verbatim or a statement and says,
2 these are only my interview notes, and he has no recollection of
3 them, and they want to put them in as impeachment, and the rule
4 says you can't do it.

5 MR. BALLANTINE: Your Honor, he does have a
10:15:56 6 recollection of these notes. He took notes; he remembers how he
7 took them; he remembers all the context surrounding them. And
8 the jury can conclude whether -- the notes, I think, go to
9 weight of the evidence and not its admissibility. The jury can
10 conclude that perhaps he took notes in error. Perhaps when he
11 wrote October he meant November.

12 But -- I'm just -- I'm pulling up the rule, Your
10:16:21 13 Honor.

10:16:27 14 Your Honor, the Government's going to be -- would
10:16:30 15 seek admission of this testimony under not 801 but Rule 803.5.

10:16:45 16 MR. CONROY: Your Honor, all they are doing by
10:17:00 17 indicating they want to use the Rule 803.5 is making two
18 mistakes. One is they're now injecting a hearsay within
19 hearsay problem into the issue, which is to say if the
10:17:12 20 memorandum or record concerning the matter which the witness is
21 testifying about is at issue, then the witness can say, yes,
10:17:21 22 this is my memorandum. This is how it was taken. This is what
23 I did with it. This is why my memorandum is admissible as to
10:17:30 24 me, the witness. But as to Cook, the declarant, it remains a
25 problem within the statement because it remains hearsay. The

10:17:39 1 only way to get evidence in against Cook through that statement
2 is under impeachment Rule 801.

10:17:46 3 THE COURT: Why would it not come under (d)(2)?

10:17:50 4 MR. CONROY: Because under 801(d)(2) we have the
10:17:56 5 following: The statement is offered against the party, and it's
10:18:01 6 the party's own statement, and that has to be defined, or is
10:18:05 7 adopted by the party. Now, the document itself says it's not
8 his statement, and it was never adopted by Mr. Cook.

10:18:15 9 MR. BALLANTINE: I think Mr. Conroy is using an
10 over-formalized view of the word statement. I mean, a
11 statement in the Rule is --

12 THE COURT: Need not be a written statement. It
10:18:24 13 could be an oral statement made in the presence of the
14 testifying witness.

15 MR. CONROY: The witness going to testify that this
16 is verbatim, that this is his statement? He's not going to
17 testify to any such thing.

18 MR. BALLANTINE: Your Honor, I don't think he has
19 to. I think he's going to say this is what Mr. Cook told me.
20 He may not remember the exact words, but he told me he saw this
21 video in October of 2001, early October, 2001. Also, Your
10:18:49 22 Honor, this is also an admission by the defendant.

10:18:54 23 THE COURT: Well, that's why I said 801(d)(2).

10:18:59 24 MR. CONROY: It isn't. It is not a statement
25 because the guy who wrote the memo says it's not his statement,

1 and it is not adopted because he was never offered the
10:19:10 2 opportunity to adopt it. It can't be an admission against
3 interest. The best place to look, Your Honor, for a definition
4 of statement that seems --

5 THE COURT: That's in the disjunctive, or --

10:19:32 6 MR. CONROY: It's neither.

10:19:34 7 MR. BALLANTINE: Your Honor 801(a), a statement or
10:19:38 8 an oral or written assertion; or, 2, non-verbal conduct of a
9 person if it is intended by the person as an assertion. Mr.
10:19:50 10 Cook asserted that he saw the video in early 2001.

11 THE COURT: I think it comes in under 801, and I
12 think it comes in specifically under 801(d)(2).

10:20:02 13 MR. CONROY: (d)(2)?

10:20:03 14 THE COURT: (d)(2)(A).

10:20:06 15 MR. CONROY: As the party's own statement?

16 THE COURT: As the party's own statement made to
17 the witness who is subject to cross-examination.

10:20:12 18 MR. CONROY: All right, Your Honor. Exception
19 noted.

10:20:21 20 MR. BOSS: Judge, perhaps this is an appropriate
21 time to address the question of Mr. Siemaszko having been
10:20:27 22 subpoenaed to court and the government's decision to withdraw
10:20:30 23 that subpoena. I need to attend another proceeding in a
10:20:34 24 moment. Your Honor, I've been advised by Mr. Poole that the
25 government has reconsidered and has decided not to call Mr.

10:20:43 1 Siemaszko to the witness stand in their case. That having been
2 said -- I take their silence to confirm that fact -- Mr.
10:20:52 3 Siemaszko at this time would withdraw his motion to quash that
10:20:56 4 subpoena.
5 THE COURT: Very good.
10:21:01 6 MR. BOSS: Thank you.
7 THE COURT: Mr. Siemaszko will not be called in
10:21:05 8 this proceeding?
10:21:08 9 MR. POOLE: That's correct, Your Honor.
10:21:08 10 (Recess taken.)
10:35:30 11 (Jury enters the courtroom.)
12 THE COURT: Please call your next witness.
13 MR. BALLANTINE: Your Honor, the United States calls
10:35:35 14 Randy Rossomme.
10:35:44 15 (The witness was sworn by the clerk.)
10:35:52 16 - - -
10:35:52 17 RANDALL ROSSOMME, DIRECT EXAMINATION
10:35:53 18 BY MR. BALLANTINE:
10:35:53 19 Q. Good morning.
20 A. Good morning.
10:36:02 21 Q. Would you please state your full name for the record and
22 spell your last name?
23 A. Randall Lee Rossomme, R-o-s-s-o-m-m-e.
10:36:13 24 Q. Mr. Rossomme, where do you work?
25 A. I work for the FirstEnergy Nuclear Operating Company,

1 and my current office is stationed in Akron.

2 Q. Is that the headquarters for FENOC?

10:36:26 3 A. That is correct.

4 Q. Prior to that where did you work?

5 A. I worked for the Beaver Valley Power Station in
10:36:32 6 Shippingsport, Pennsylvania, also for FENOC.

7 Q. What was your job at Beaver Valley?

8 A. Beaver Valley I worked at various jobs. My most recent
10:36:41 9 one was supervisor of procurement of engineering. Prior to
10 that I was supervisor in oversight, which is quality assurance.

11 Q. During the time that you worked as a supervisor in
12 oversight of quality assurance, did you have an occasion to work
10:36:58 13 on the Davis-Besse response to finding a cavity in February of
10:37:07 14 2002?

10:37:08 15 A. Yes.

16 Q. Thank you. Could you tell the jury about your
10:37:14 17 interactions at Davis-Besse?

10:37:15 18 A. Shortly after they had discovered that the control rod
10:37:21 19 drive mechanism tilted, they were forming a root cause team.
20 And as I was in the Quality Assurance Department at Beaver
21 Valley, they wanted an independent oversight of the formation of
22 that team and the plan of getting started. And they sent
10:37:36 23 several of us from Beaver Valley up to do that quick overview of
24 how they were conducting business.

10:37:41 25 Q. When was that?

1 A. That was in February of 2002, as I recall.

2 Q. So soon after the nozzle tilted over and they were

10:37:49 3 reacting to that?

4 A. That is correct.

5 Q. What did you do while you were on-site for that purpose?

6 A. One of my particular assignments was to again be looking

7 at the formation of the team, make sure they had a fair amount

8 of people from offsite, the right mix of people, that they were

9 going to approach it in a reasonable manner look, look at the

10 evidence, ask the right questions, et cetera. And I would be

11 in parallel looking at different facts and seeing if they were

10:38:19 12 going to follow up on those facts.

10:38:21 13 Q. So you were making sure that the team that was going to

14 look into this was going to do a good job?

15 A. Correct.

16 Q. Did you review any documents at that time?

10:38:30 17 A. I reviewed several documents at that time, yes.

10:38:33 18 Q. Did you review docketed responses to bulletin responses

10:38:40 19 2001-01?

20 A. Yes, I did.

21 Q. Are you familiar with Serial Letter numbers at all, or

10:38:45 22 were these the documents submitted by Davis-Besse in the fall of

10:38:48 23 2001 in response to that bulletin?

24 A. Yes. There were four serial letters submitted that I

10:38:54 25 reviewed.

1 Q. Did reviewing those documents raise any concerns with
2 you?

10:38:58 3 A. When I read them, my personal response to them was that
10:39:03 4 they did not represent what I viewed as the truth.

5 Q. What did you do about that?

6 A. I went to my boss's boss, who was the director, and I
7 showed him the serials, and I said, I don't think these -- what
8 I said was I think they, meaning Davis-Besse, lied; and that
9 these need to be looked into.

10 Q. What did your boss tell you?

11 A. The boss said that I could subsequently sometime look
10:39:28 12 into those, but for now he wanted me to stay on course for why I
13 was there.

14 Q. What did you do?

15 A. I continued back on that visit. I continued on the
10:39:37 16 other job. I was looking to see if they were going to be
17 looking at management issues. They were not geared that way.
18 I formulated a list of questions. There was a gentleman from
10:39:47 19 INPO who was coming up to do a parallel effort to mine. It was
20 determined that our team would go back to Beaver Valley. I
21 turned my questions over to him, and we returned to Beaver
22 Valley at that time in February.

10:40:00 23 Q. That visit in February, did you return to the site?

24 A. Yes, I did.

25 Q. Why was that?

10:40:05 1 A. My vice-president of oversight in the April time frame
2 was concerned that while they had done the technical root cause,
3 they had not adequately looked at management issues. In the
4 technical root cause they identified five historic CRs that
10:40:23 5 possibly could have identified the degradation of the head
6 earlier. He wanted the oversight group to go in and look at
7 those five CRs and evaluate if that was true, and what facts we
8 could find. So I formed a team, myself and another individual
9 from Beaver Valley, and two individuals from Perry, and we
10 returned to Davis-Besse to do that review.

10:40:44 11 Q. At that point in time, were you looking into the
10:40:48 12 truthfulness of the docketed bulletin responses?

10:40:51 13 A. Prior to going up there when I met with my
10:40:54 14 vice-president I asked him again if I could follow up on that,
15 and he said after I was done with the five historic CR
10:41:01 16 investigations I could look into docketed information.

17 Q. So when you looked at those five historic CRs, you did
18 some work on that, and did you reach conclusions?

19 A. Yes.

10:41:12 20 Q. And very briefly, what were those?

21 A. My conclusions, which I documented in a memo --

10:41:21 22 MR. WISE: Objection, Your Honor. Relevance.

10:41:23 23 MR. BALLANTINE: I can move on, Your Honor.

24 THE COURT: Very good.

10:41:28 25 BY MR. BALLANTINE:

10:41:28 1 Q. Did you then follow up on the -- what you talked to your
10:41:34 2 vice-president about, about talking to people about these
10:41:37 3 docketed responses?

4 A. Yes, I did interviews relative to drafting and
10:41:42 5 submittals of the Serial Letters.

6 Q. How did you decide who to interview?

7 A. The Serial Letters, there is a sign-on page where people
8 review it and approve it and make comments, and I went down
10:41:52 9 through the signatures of those and tried to interview as many
10 of those individuals as I could.

11 Q. Did you interview Rod Cook?

10:41:59 12 A. Yes, I did.

13 Q. And did you interview David Geisen?

10:42:02 14 A. Yes, I did.

15 MR. WISE: Objection. Can we approach?

10:43:10 16 (Whereupon the following discussion was had at the
17 bench outside the hearing of the jury:)

18 MR. WISE: I was told by the government that this
19 was about Mr. Cook and not Mr. Geisen. That's why we didn't
20 engage in the discussion about the propriety of this witness.

21 THE COURT: That was my understanding.

22 MR. BALLANTINE: In prepping for him, one question
23 came up. I'm happy to let it go.

24 MR. CONROY: We have a standing objection to all of
25 this.

1 THE COURT: Standing objection is granted. And
2 Mr. Wise's objection is sustained.

3 (End of side-bar discussion.)

10:43:12 4 BY MR. BALLANTINE:

5 Q. Mr. Rossomme, tell the jury how you set up your
6 interview with Mr. Cook.

7 A. Well, I -- how I set up all my interviews is I went
8 through the serial, I formulated questions, I put them on my
10:43:24 9 laptop. I would then go through and either contact individuals
10:43:29 10 directly, or sometimes I would ask David Eschelman to help
10:43:37 11 coordinate setting those up. Then we'd get together, I'd go
10:43:40 12 through those questions. As the interview went on, if I had
13 other questions, I would add them.

10:43:47 14 Q. Did you ask Mr. Cook about the bulletin responses?

10:43:50 15 A. Yes.

16 Q. Did you ask him what his role was in preparing those
17 bulletin responses?

18 A. Yes.

19 Q. What was his role?

10:43:59 20 A. He was the preparer or the coordinator of the bulletin
21 responses.

10:44:03 22 Q. And did you ask him about how he got information for
23 those responses?

10:44:11 24 MR. CONROY: Your Honor, I'm going to object until
10:44:14 25 we have a foundation for this. Is the witness testifying from

10:44:17 1 his recollection or is the witness testifying from his notes?

2 MR. BALLANTINE: Mr. Rossomme, do you have any
3 notes up there with you right now?

10:44:28 4 THE WITNESS: I have no notes with me.

5 BY MR. BALLANTINE:

6 Q. How did Mr. Cook collect information for these serial
10:44:35 7 responses?

8 A. There was a plan put together by Davis-Besse on how to
9 address the responses. They -- the order had various sections
10:44:46 10 in it to be responded to, various individuals were assigned to
10:44:51 11 complete those sections, and they would coordinate them through
12 Mr. Cook.

10:44:57 13 Q. Did Mr. Cook tell you about his understanding of the
10:45:00 14 condition of the reactor vessel head at the end of the 2000
10:45:04 15 refueling outage?

10:45:10 16 A. Currently I can't recall that unless I look at my notes.

10:45:31 17 Q. I'm going to mark the document Government's Exhibit 162.
18 Can you tell the jury what this document is?

19 A. This document is a printout from what I entered into my
10:45:40 20 laptop during the interview process of my interview with Mr.
21 Cook.

22 Q. And directing your attention to the numbered paragraph
10:45:48 23 number 6, did Mr. Cook tell you anything about -- well, does
24 that refresh your recollection about Mr. Cook's understanding of
10:45:58 25 the condition of the reactor vessel head?

10:46:01 1 A. This gives me what was said. This is basically my
10:46:05 2 recollection.

10:46:06 3 MR. CONROY: Your Honor, objection. I do not
4 understand what the witness is saying, if he has present
5 recollection or he's working from his notes.

6 THE COURT: He just indicated that reading his
7 notes refreshed his recollection.

10:46:20 8 MR. CONROY: So he now has a present recollection
9 of what was said at this interview?

10 BY MR. BALLANTINE:

11 Q. Mr. Rossomme, do you have a present recollection of what
12 was said at this interview?

13 A. My recollection of the interview comes strictly from
14 reviewing my notes.

15 Q. The question is, when you review your notes, does that
16 help you remember what happened then, or are you reporting to us
10:46:41 17 -- would you be reporting to us what you wrote down?

10:46:44 18 MR. CONROY: Objection. Asked and answered.

10:46:46 19 THE COURT: Overruled.

10:46:49 20 A. For the specific answers to the questions, I would be
10:46:54 21 using my notes for the recollection of them.

10:46:57 22 MR. BALLANTINE: Your Honor, at this point I would
10:47:01 23 ask that Mr. Rossomme be permitted to read the response to
24 question -- the question and the response for number 6 as a past
25 recollection recorded.

1 BY MR. BALLANTINE:

2 Q. Let me ask you this: I think you've already testified,
3 but as you were interviewing Mr. Cook, were you taking down what
4 he was telling you?

10:47:19 5 A. Because I type relatively proficiently, I chose to type
10:47:25 6 during the interview because I could type faster. And to the
7 best of my ability, I was capturing it real time and did not
10:47:34 8 change it.

9 Q. But it's not a verbatim transcript, is it?

10:47:37 10 A. No, I could not always keep up with the long discourse.
11 If it was a short phrase, three or four words, it would be
10:47:45 12 verbatim. Longer sentences or paragraphs, I was going as fast
13 as I could, but they would not be totally accurate.

14 Q. When you say they would not be totally accurate, you
10:47:54 15 mean they wouldn't be quotes?

16 A. They wouldn't be quotes. The word, the sentiment, the
17 meaning is there, but they would not be verbatim quotes.

10:48:02 18 Q. You mean you were working to be accurate, to accurately
19 convey what was being told to you?

10:48:08 20 A. I was trying to capture as many of their words as I
21 could to the best of my ability.

10:48:13 22 MR. BALLANTINE: Your Honor, I would ask the Court
23 to permit Mr. Rossomme to read to the jury his question six and
10:48:19 24 its answer.

25 MR. CONROY: Objection. I don't believe that's

1 the appropriate way to use past recollection recorded.

10:49:44 2 THE COURT: I presume the numbered questions were
10:49:47 3 prepared by you?

10:49:50 4 THE WITNESS: Typically yes, but if in the course
10:49:54 5 of a conversation I had another question, I would add it in and
10:49:58 6 number it.

10:50:53 7 MR. BALLANTINE: The specific rule the government is
10:50:55 8 referring to is 803.5.

10:51:22 9 THE COURT: I'll permit it under 803.5.

10:51:27 10 BY MR. BALLANTINE:

10:51:28 11 Q. Mr. Rossomme, if you would, please read -- and there's a
12 court reporter here, so you need to be paced in the way you read
10:51:35 13 it --

14 A. I understand.

10:51:36 15 Q. -- would you please read question 6 and its answer?

16 A. Question 6 states on page 2: It is noted that the scope
17 of the visual inspection was to inspect the bare metal on the
18 RPV head that was accessible. Did you understand that some
10:51:58 19 areas were not accessible when you wrote this September 4th
20 letter?

10:52:05 21 The response to that question was this: We knew
22 there was some boric acid on the head, both Andrew and Prasoon
23 had told him they had left some. Originally had -- knew top
10:52:21 24 four nozzles were covered with some running down the side. It
25 was later, maybe in November, the letter with the pictures, it

1 was then it got a better picture, but it still wasn't obvious
10:52:35 2 that most of the boron wasn't up at the top center nozzles. He
3 reviewed the videos about the beginning of October. Videos were
10:52:44 4 converted into the DVD format, and Geisen took the videos to
10:52:49 5 D.C., VHS.

10:52:59 6 Q. Mr. Rossomme, did Mr. Cook talk to you at all about
10:53:04 7 Condition Reports or potential conditions adverse to quality
10:53:10 8 reports?

9 A. According to these notes, yes.

10 Q. Sitting here today, do you have a present recollection
10:53:17 11 of what he told you?

10:53:18 12 A. Apart from the notes, no.

10:53:25 13 MR. BALLANTINE: Your Honor, with that I would ask
14 that Mr. Rossomme be permitted to read to the jury question 10,
15 and it may take a little bit of explanation just because it's a
10:53:37 16 follow on from a previous question, and its answer.

10:53:40 17 THE COURT: May I see it?

10:53:46 18 MR. CONROY: Same objection, Your Honor.

10:54:01 19 BY MR. BALLANTINE:

20 Q. Mr. Rossomme, if you would, I'd ask you to first just
21 read question 10, then stop. We'll have another follow-up
10:54:09 22 question to ask you.

23 A. Question 10 was a conditional question: If yes, did it
24 raise any concerns to you relative to subject matter of the
25 letter?

1 Q. What was that conditional question referring to?

2 A. This is referring back to: Did you know if there was --
10:54:24 3 basically some areas that weren't accessible or if there was
4 boric acid on the head.

5 Q. So the condition was if they knew that there was boric
6 acid on the head. What was Mr. Cook's answer to that question?

10:54:41 7 A. His answer was as follows: I talked to them. They
10:54:49 8 didn't clean the head, and they pulled out the MRPs that dry
10:54:55 9 boric acid was not a concern. They were citing that, and that
10 is what we had, boric acid from flanges. They showed me CRs
10:55:05 11 stating they had corrected the leakage. And all the CRs said
12 it was from the flanges. 96-00551 and one in the lone RFO and
13 even Andrew's CR in 2000 said it was flanges.

10:55:25 14 Q. Directing your attention to question 33 of your notes,
15 did you speak to Mr. Cook at all -- did you have any more
10:55:40 16 conversations with Mr. Cook with respect to review of the
17 inspection videos?

10:55:45 18 A. Question 33 does ask that question.

10:55:49 19 MR. BALLANTINE: Your Honor, the same by basis, I'd
20 ask that Mr. Rossomme be permitted to read that question and
21 answer to the jury.

10:55:56 22 MR. CONROY: Objection, relevance.

10:56:01 23 BY MR. BALLANTINE:

10:56:01 24 Q. Mr. Rossomme, does that question have to do with viewing
10:56:06 25 videotapes of past inspections?

10:56:08 1 MR. CONROY: Objection, relevance.

10:56:11 2 THE COURT: Let him answer the question, please.

10:56:15 3 THE WITNESS: Could you restate the question,
4 please?

5 BY MR. BALLANTINE:

6 Q. Did your question have to do with review of videotapes
7 of past inspections, question 33?

8 A. Yes.

10:56:22 9 THE COURT: Overruled.

10:56:24 10 BY MR. BALLANTINE:

10:56:24 11 Q. Mr. Rossomme, would you please read question 33 and Mr.
12 Cook's answer to it to the jury?

10:56:31 13 A. Question 33 states: Did you review the videotapes?
14 The response was: Yes, probably after September
10:56:43 15 4th.

10:56:47 16 MR. BALLANTINE: Thank you, Mr. Rossomme.
17 I have no further questions, Your Honor.

10:56:55 18 THE COURT: Mr. Conroy?

10:56:58 19 MR. CONROY: Thank you, Your Honor.

10:57:01 20 - - -

10:57:01 21 RANDALL ROSSOMME, CROSS-EXAMINATION

22 BY MR. CONROY:

23 Q. Good morning, Mr. Rossomme.

24 A. Good morning, sir.

10:57:15 25 Q. I just want to make sure so that everybody is very clear

1 on this, you are testifying from your notes?

2 A. Correct, sir.

3 Q. And your notes at the top, the very top of your notes

10:57:29 4 that have now -- were they admitted? No, they were not. The

5 very top of your notes it says, if I am reading this correctly,

10:57:40 6 answers are paraphrases in interviewer notes. Answers should

7 not be considered as quotes or of transcript quality.

8 Did you write that?

9 A. Yes, I did.

10 Q. And you meant that; did you not?

11 A. Yes, I did.

12 Q. That this was not a statement from this witness?

13 A. These were not verbatim quotes.

10:58:01 14 Q. Now, when you did these interviews, it was after the

10:58:06 15 cavity event had taken place at Davis-Besse; is that correct?

16 A. It was after the cavity had been detected, yes, sir.

10:58:14 17 Q. And so if your notes do not indicate when Mr. Cook found

10:58:21 18 something out, it is not clear to you from your memory when that

19 was prior to when you did your interview; is that correct? It

20 could have been after the cavity; it could have been before the

21 cavity?

10:58:37 22 A. When Mr. Cook knew of the boric acid of the head other

23 than prior to the first serial, I do not know when he became

10:58:48 24 knowledgeable of that. Sometime prior to the first serial he

25 became knowledgeable.

1 Q. Of what?

2 A. Of boric acid on the head.

10:58:55 3 Q. And that is because of Question 6?

4 A. Well, it's also because of Question 6, and also I had
10:59:01 5 reviewed drafts, four draft letters of the first serial, and it
10:59:06 6 was clear in the draft letter to the serials that there was
10:59:09 7 boric acid on the head.

8 Q. So the draft letters as expressly stated is what you
9 were relying upon for knowledge that Mr. Cook knew about boric
10 acid on the head?

10:59:20 11 A. I actually got the draft letters after this interview
12 from Mr. Cook. Mr. Cook made me aware of the draft letters.
13 But the combination of this interview and reading if serials
10:59:31 14 makes it --

15 Q. Gave you your information?

10:59:33 16 A. Yes.

17 Q. And, in fact, that was consistent with the letter that
18 actually went out?

10:59:39 19 A. I don't understand the question.

20 Q. The draft of 2731 with regard to material being left on
10:59:45 21 the head was also stated in 2731, the final letter?

10:59:49 22 A. I'm sorry; I still don't understand your question.

23 Q. Did 2731, the Serial Letter itself --

10:59:55 24 A. The actual one that was issued?

25 Q. -- the actual one that was issued, state that there was

11:00:00 1 boric acid left on the head?

11:00:02 2 A. In my interpretation it was not clear in 2731 that that

11:00:08 3 was the case, that that was an ambiguous point.

4 Q. It wasn't clear enough?

11:00:14 5 A. Not in the actual letter.

6 Q. And you thought it was clearer in the drafts?

7 A. I believe it was clearer in the drafts.

11:00:30 8 Q. Now, when you decided to interview Mr. Cook, it was in

9 June of 2002?

11:00:39 10 A. June was the time frame I was doing my interviews on

11:00:43 11 this particular subject, yes, sir.

11:00:45 12 Q. How much warning did you give Mr. Cook that he was to be

11:00:49 13 interviewed?

14 A. I do not recollect that, sir.

15 Q. Do you recall how long the interview took?

16 A. I do not recall how long the interview took, sir.

11:00:56 17 Q. Did you do it by yourself?

18 A. Yes, sir, I did that. I did these interviews by

19 myself.

20 Q. And you were writing in your computer as you got your

11:01:06 21 answers?

22 A. That is correct, sir.

23 Q. Did you ever give anything to Mr. Cook to approve of

24 what you wrote down?

11:01:12 25 A. I typically offered all my interviewees a chance to

1 review the PV and the responses at that point in time.

11:01:22 2 Q. Do you know that you did that?

3 A. I know that I offered it. I did that in every case.

4 I do not recall if he took me up on that.

11:01:33 5 Q. You don't have any recollection that you actually did

6 that?

7 A. Other than the fact I did that in all the interviews.

11:01:40 8 I have nothing specific as to that case.

9 Q. You have no recollection of whether he actually read it?

10 A. I cannot recall that.

11:01:47 11 Q. Did you follow a written procedure in asking your

12 questions?

11:01:51 13 A. I developed only my own questions and followed those

14 questions.

11:01:56 15 Q. And you decided to do this investigation based on your

11:02:00 16 own belief that the Serial Letters were -- what were they, lies?

17 A. My first response, when I read it in February, without

11:02:09 18 interviewing anybody at that point in time, my first gut

19 response was they lied; "they" being Davis-Besse.

11:02:17 20 Q. And you were not asked to do an investigation of the

11:02:22 21 letters; is that correct?

22 A. I was never asked to do an investigation of the letters.

11:02:26 23 I did ask permission to do the investigation.

11:02:29 24 Q. And you prepared the questions in advance and then left

11:02:33 25 gaps for the answers?

11:02:34 1 A. Yes.

11:02:36 2 Q. And if there were additional questions, you would type
3 them in your computer?

11:02:41 4 A. Correct.

5 Q. And leave gaps for those answers?

11:02:43 6 A. I would type in the question, ask it, then type in the
7 answer.

8 Q. And you typed them as fast as you could?

11:02:49 9 A. Yes.

11:03:06 10 Q. What did you tell Mr. Cook you were going to ask him
11 about before you talked to him?

12 A. Without recalling, I presume I would have told him I was
13 going to talk to him about the letters.

14 Q. But you don't have any recollection of that?

11:03:20 15 A. No, sir.

11:03:22 16 Q. You don't have any recollection of how much lead time
11:03:26 17 you gave him to get ready?

18 A. No, sir.

11:03:32 19 Q. At the time that you conducted your interviews, what
11:03:36 20 background did you have, besides your reading of the letters, of
21 what had gone into preparing them?

11:03:43 22 A. Gone into preparing the actual letters, the only
11:03:48 23 background I would have had is the review of the cover sheets,
11:03:54 24 the review of the plan, and general knowledge of how Regulatory
11:03:59 25 Compliance, or whatever, deals with requests from the NRC.

1 Q. What did you know about how Regulatory Affairs or
11:04:07 2 Regulatory Compliance, as you call it, deals with requests from
11:04:11 3 the NRC?

4 A. When some of those would come in at Beaver Valley, which
11:04:17 5 is where I typically worked, there have been a couple times I
11:04:20 6 have been asked to be included in developing responses to
7 various issues. And the document comes in, Regulatory
8 Compliance works with the management team to find out who the
9 appropriate individual to research these issues are. They
10 assign it to those individuals. The individuals come back with
11:04:38 11 information. It's coordinated through Regulatory Compliance to
12 produce the final letter.

13 Q. So it's clear to you from your answer, as I understand
11:04:47 14 it, that Regulatory Compliance, as you call it, doesn't prepare
15 the technical answers themselves; they just gather them up?

16 A. There is a large part that they are merely coordinating.

11:05:11 17 Q. When you were writing your answer to Question 6, did you
11:05:16 18 understand what part Prasoon had said and what part Andrew had
19 said to Mr. Cook?

11:05:23 20 A. I do not know that I inquired into that at all.

21 Q. Do you know whether or not Mr. Goyal was talking about
22 the same inspection as Mr. Siemaszko?

11:05:41 23 A. We were not necessarily talking about specific
11:05:44 24 inspections. The question was geared to was there knowledge
11:05:48 25 that the entire head was accessible.

11:05:51 1 Q. You don't know which inspections you were talking about?

11:05:57 2 A. The question was: Did you understand that some areas
3 were not accessible when you wrote this September 4th letter?

4 And the response was: We knew there was some boric
5 acid on the head.

6 Q. Did you know that they were talking about more than one
11:06:10 7 past inspection?

11:06:12 8 A. Based on other investigations I have done.

9 Q. When?

11:06:17 10 A. Prior to this interview. I was involved in the review
11 of the five historic CRs, and those five historic CRs dated back
12 to 1996. And I had knowledge that boric acid had been on the
13 head since 1996 prior to doing this interview.

11:06:38 14 Q. Which inspections were Prasoon and Andrew talking to him
15 about when you say both Prasoon and Andrew had told him they
16 left some? When did they leave it?

17 A. I did not say both Andrew and Prasoon had told him. He
11:06:53 18 said both Andrew and Prasoon had told him.

19 Q. I understand you're trying to say what he said. I'm
20 asking you when he said that. What past inspections was he
11:07:02 21 talking about?

22 A. I do not know the answer to that question.

11:07:09 23 Q. Now, you say it -- in that answer you say it was later,
11:07:13 24 maybe in November, the letter with the pictures. Do you know
25 which letter with the pictures that is?

1 A. When he said that it was later, maybe in November, that
2 would have either been the third or fourth serial.

11:07:29 3 Q. You can't remember?

4 A. Not unless I would go back and look at the serials.

5 Q. And it's not written here?

11:07:36 6 A. I did not inquire for him to clarify that, no.

11:07:40 7 Q. So therefore there is no way that you can testify as to
8 what letter he was talking about when he's talking about the
9 November letter?

11:07:48 10 A. All I could testify is he referred to a letter, possibly
11:07:52 11 in November.

11:07:57 12 Q. When he was talking about seeing videos in October, why
13 was your next sentence: Videos were converted into a DVD format
11:08:05 14 and Geisen took the videos to D.C., VHS?

15 A. That is not my sentence. That is something that he
11:08:12 16 volunteered, and that is why it is there.

17 Q. Did he volunteer it at the same time as he said the
11:08:17 18 videos were seen about the beginning of October?

11:08:23 19 A. I would have been typing his whole response. The
11:08:34 20 sentences follow one and another. So yes, he would have said
11:08:37 21 them at the same time.

11:08:38 22 Q. So there would have been a connection between the time
23 he was seeing the videos and Geisen taking the videos to D.C.?

11:08:45 24 A. In his mind, I guess, yes.

11:08:51 25 Q. With regard to question 10, you indicate that Mr. Cook

11:09:03 1 is telling you that they -- that he talked to, "them" being
2 Andrew and Prasoon again?

11:09:12 3 A. That is how I understand these notes.

4 Q. When did he talk to them?

5 A. Based on the notes, referring back to question 6, this
11:09:19 6 would have been prior to the September 4th letter.

7 Q. Are you saying that this paragraph 10 clearly refers
8 back to paragraph 6 and the fact that this was done before
11:09:30 9 September 4th?

10 A. That was my -- yes. That's -- the questions here say
11:09:38 11 -- Question 6 says the -- Questions 7, 8, 9, 10 and 11 say: If
11:09:46 12 yes, then hereafter's the question. So this is pertaining back
13 to Question 6 about the accessibility. And it say: If yes,
14 did it raise concerns in you relative to subject matter of the
15 letter?

16 Q. So the question in Question 6 was: Did you understand
17 that some areas were not accessible when you wrote the September
18 4th letter, right, back to question 6?

19 A. The Question 6 was: Did you understand that some areas
20 were not accessible when you wrote the September 4th letter?

21 Q. Now we go to Question 10. And we're asking: Did it
22 raise any concerns in you relative to subject matter of the
11:10:25 23 letter? And your answer started: I talked to them, that they
24 didn't clean the head, and they pulled out the MRPs that dry
25 boric acid was not a concern.

1 When did he talk to them about the head not being
2 clean and pulling out MRPs?

11:10:41 3 A. The context of the response would have been prior to
11:10:46 4 September 4th.

11:10:47 5 Q. And you're indicating that what they were citing was
6 that we had boric acid from flanges?

11:10:57 7 A. What he answered was they were citing that, and that is
11:11:02 8 we had boric acid from flanges.

11:11:04 9 Q. And that they showed him CRs in which they had corrected
10 leakage or the damage. Do you know what he's talking about?

11:11:13 11 A. He states here that they showed me CRs stating they had
12 corrected the leakage and all the CRs said it was from the
13 flanges.

11:11:20 14 Q. And he's talking about 96-551?

15 A. That is one of the three CRs he's referencing.

16 Q. And there's no doubt in your mind that when he was
11:11:30 17 talking about September 4th, he was referencing CR 96-551 based
11:11:37 18 on your notes?

11:11:40 19 A. Would you clarify your question?

11:11:43 20 Q. You are indicating that this answer referred to a period
21 of time prior to the 4th of September.

11:11:53 22 A. I'm answering this line of questioning: Did you
23 understand that some areas were not accessible when you wrote
11:12:03 24 the September 4th letter? This is one of the follow-up
11:12:06 25 questions. So it was my understanding, or at least what the

11:12:09 1 notes would indicate, that --

2 Q. That this knowledge that he is imparting to you involves
3 a period of time prior to the 4th of September?

11:12:18 4 A. Correct.

5 Q. All right. Now, in imparting that knowledge, he is
11:12:23 6 talking to you about Mr. -- he's talking about they, being
7 Andrew and Prasoon, showing you a CR 96-551?

11:12:35 8 A. He is referring to Andrew and Prasoon showing him a CR
11:12:41 9 960551.

11:12:44 10 Q. So if, in fact, the letter that was sent prior to
11:12:51 11 September 4th, 2731, did not involve any review of 1996
11:12:59 12 inspections, would that present an inconsistency in your notes?

11:13:05 13 A. I'm sorry; I'm still not following you.

14 Q. If the documents that Mr. Cook is saying Mr. Goyal and
11:13:21 15 Mr. Siemaszko showed him included a CR from a 1996 inspection,
16 and there was no question or answer about 1996 in the letter
11:13:36 17 sent before September 4th, why would he have been talking to you
18 about 96-551?

11:13:43 19 A. Well, I'm still not sure I understand the question.
20 The letter was sent September 4th.

11:13:48 21 Q. That's right.

22 A. I was asking him if he had knowledge of the boric acid
11:13:54 23 or accessibility of the bare metal prior to September 4th. His
11:13:58 24 indications were yes, and his indication was he had that
25 knowledge based on being shown these documents by Andrew and

1 Prasoon. But I don't know that -- those are not referenced in
2 the letter. He's just telling me how he knew.

3 Q. But he didn't tell you when he was shown that
4 information?

5 A. He did not from -- the context of the question was: Did
6 you understand that some areas were not accessible when you
7 wrote this September 4th letter?

8 Q. That's Question 6. We are now in Question 10.

11:14:32 9 A. Yes, they are all tied together.

10 Q. And he is telling you what Prasoon and Andrew told him
11 about past CRs?

11:14:39 12 A. Correct.

11:14:40 13 Q. When did he tell you that Prasoon and Andrew told him
11:14:45 14 about past CRs?

15 A. There is nothing in the notes to indicate that he
11:14:50 16 specified a time.

17 Q. So it could have been after the cavity was found?

18 A. I do not believe that. I mean --

11:14:58 19 Q. You don't know that?

20 A. I do believe --

21 THE COURT: Excuse me. One at a time. And the
11:15:07 22 context of the answers he has consistently given, I hate to
23 interrupt, but enough is enough, is that it was prior to the
24 writing on September 4th.

11:15:23 25 BY MR. CONROY:

11:15:24 1 Q. Mr. Rossomme, I don't mean to argue with you. What I'm
2 trying to find out is why Mr. Cook would have indicated to you
3 he was talking about a 1996 inspection in connection with the
4 first Serial Letter. Do you know that?

11:15:38 5 A. What I know is I was asking him about how he knew -- if
6 it was a concern to him that there was boric acid on the head.
7 He's answering when he had known prior to September 4th there
11:15:53 8 was boric acid on the head. This is how he came to some
9 resolution or how he discussed it. And he volunteered all this
11:16:01 10 other information.

11 Q. And you don't know whether he was volunteering other
12 information with regard to prior to September 4th or after when
13 he found this out?

14 A. My belief is he was referring to September 4th. I do
11:16:15 15 not know that.

11:16:19 16 Q. And if Mr. Goyal had indicated in testimony in court
17 that he had never looked at any CRs or PCAQs with regard to 1996
11:16:32 18 in the year 2001, that he did not do that at all in 2001, how
19 would you reconcile that statement with this note of yours?

20 MR. BALLANTINE: Objection, Your Honor. I think
21 the question may be stating a fact not in evidence, although it
11:16:46 22 may be that -- I think he started asking out if Mr. Goyal had
11:16:50 23 testified. Are you referring to Mr. Cook?

24 MR. CONROY: I can give you three instances in
25 which Mr. Goyal testified that he did not look at any PCAQs in

11:16:59 1 2001.

11:17:01 2 THE COURT: Fine.

11:17:03 3 MR. CONROY: I want to know how he can reconcile
4 that testimony with what he wrote in this answer.

11:17:09 5 BY MR. CONROY:

11:17:09 6 A. First of all, I do not know what Mr. Goyal testified to.

7 Q. I know that.

8 A. I do know that Mr. Goyal was initiated in 960551, so Mr.
11:17:25 9 Goyal had knowledge of 96551.

11:17:30 10 Q. I'm sorry, he initiated and he what?

11 A. He was involved.

12 Q. He was involved?

13 A. In the resolution of 960551. So he had knowledge of
11:17:39 14 960551. As to all the particulars of conversation between Mr.
15 Cook and Mr. Goyal, I only know what Mr. Cook told me in
16 response to this question.

17 Q. And all that you know is what you've got written down
18 here?

19 A. Relative to that question, yes, sir.

11:18:15 20 Q. And I want you to reference question 29-A in your notes.

11:18:27 21 A. Yes, sir.

22 Q. How about the BACC -- this is 29-A. This is the
23 question: How about the BACC where Prasoon in 96-551 said there
11:18:39 24 was non-compliance with the procedure?

11:18:41 25 And the answer was: I guess they justified getting

11:18:44 1 around the procedure. After I looked at 324 a little later on,
2 it was all "shoulds." And "should" doesn't mean you have to do
3 anything.

4 Do you recall answering -- giving that question and
11:18:58 5 getting that answer?

6 A. I don't recall actually getting it. It's there in the
7 notes.

11:19:08 8 MR. CONROY: No further questions.

11:19:10 9 MR. BALLANTINE: Your Honor, I'd move the admission
10 of Government's Exhibit 163. I move only because Counsel had
11:19:15 11 asked questions related to a specific questions.

12 THE COURT: We'll discuss it out of the presence of
13 the jury. You may step down.

11:19:32 14 Any further witnesses?

15 MR. POOLE: No, Your Honor. The government rests
11:19:36 16 its case.

11:19:50 17 THE COURT: Ladies and gentlemen, it is now at that
11:19:54 18 time when the Court will be completing jury instructions which
19 then have to be replicated. This takes a significant period of
20 time, as does the review of all exhibits to make sure they've
21 been admitted or excluded. Therefore, I'm going to give you a
11:20:24 22 very long break until 2:30.

23 Let me tell you about the rest of the day. We
24 will at or about 2:30 -- it could be that you be there for
25 several minutes waiting for the duplication to be completed --

11:20:46 1 we will go through the jury instructions together. In order
2 not to break up closing arguments for any -- either the
3 government or the defendants, and to let you listen to them
11:21:09 4 completely, we will begin with closing arguments tomorrow
11:21:13 5 morning at 8:30. So you will be dismissed early sometime
6 between 3:30 and 4:00.

11:21:24 7 At the end of the taking of evidence, it is a
8 critical time in any trial, no less in this; therefore, the
11:21:35 9 instructions I give you, as I have each time we've parted,
11:21:39 10 become even more important. Please do not discuss this case
11:21:46 11 among yourselves nor with anyone else, and do not permit anyone
12 to discuss it with you. Do not read, listen to, or watch
11:21:57 13 anything touching on this case in any way. And do not make up
14 your minds on the ultimate issues you will have to decide in the
15 jury room at the end of the case after jury instructions and
16 closing arguments have been given to you. Please enjoy your
11:22:20 17 long recess. We'll be back hopefully at or shortly after 2:30.

11:38:02 18 (The jury is excused.)

11:38:06 19 THE COURT: Page 2, 3, 4, 5, 6?

11:38:30 20 MR. WISE: Your Honor, on 6, this is the section
11:38:33 21 regarding credibility of witnesses. We had asked the Court in
11:38:38 22 our memo to insert a sentence about Special Agent Ulie's opinion
11:38:44 23 regarding the credibility of -- I believe he said something
24 about Mr. Geisen and Mr. Cook. We'd ask the Court to insert a
25 sentence letting the jury know that the credibility of the

1 witnesses is solely their province and that it was improper for
2 Mr. Ulie to offer in testimony. I think a law enforcement
3 agent doing that is particularly inappropriate.

11:39:10 4 THE COURT: Does the government have a position?

5 MR. POOLE: Yes. Your Honor, to the extent one
6 could object to Mr. Ulie's testimony would be an evidentiary
11:39:22 7 objection, should have been made at the time, doesn't belong in
8 the jury instructions.

11:39:27 9 THE COURT: When I looked at this, my reaction was
11:39:36 10 that the second and third sentence would -- might be appropriate
11:39:46 11 with some corrections: You are instructed to ignore any
12 testimony regarding credibility of witnesses. It is your job
13 and your job alone to assess the credibility of the witnesses in
11:40:08 14 this case. And both defendants were witnesses.

11:40:13 15 MR. POOLE: No objection to that.

11:40:16 16 MR. WISE: Your Honor, I would prefer, if that's
11:40:19 17 what the Court's inclined to do, that the Court not do that.
11:40:23 18 My worry is there was testimony about Mr. Moffitt's impression
19 of Mr. Geisen. I don't want the jury to be misstating that to
20 be saying that's improper.

21 THE COURT: That's why we don't ever put this in
22 because the broader instruction indicating it's their duty and
23 their duty alone to make credibility determinations would permit
24 them to ignore or accept credibility statements by any witness.

11:40:50 25 Page 7? Page 8? Page 9? Page 10?

11:41:16 1 MR. WISE: I have a nitpicky problem with the 3rd
11:41:19 2 paragraph on page 10. The sentence begins: Thus, a defendant,
3 and then it says, although accused, begins with a clean slate.
4 I would ask the Court to take out "although accused." I think
5 it takes away from the message of the sentence.

11:41:34 6 THE COURT: This is a pattern instruction.

11:41:36 7 MR. WISE: I understand. I just think it's
11:41:40 8 unnecessary.

11:41:59 9 MR. HIBEY: It's that hiccup you get when you're
10 voir diring jurors and some of them have problems with the fact
11 of the indictment.

12 THE COURT: I understand. But they have been
13 accused, and it's an accusation.

11:42:13 14 MR. HIBEY: They are. They're called defendants.
15 That seems to be enough of an appellation not to have to be
11:42:20 16 worried about "although accused."

11:42:29 17 THE COURT: I'll take it out only to make somebody
11:42:32 18 happy today, but it seems to me you are correct, it is a real
19 nit and didn't deserve picking.

11:42:43 20 Page 11? Page 12? Do you want to take this out,
21 too, Mr. Wise, that the defendants have been charged?

11:43:03 22 MR. WISE: Sure.

11:43:11 23 MR. CONROY: The sentence --

11:43:18 24 THE COURT: Pardon?

25 MR. CONROY: Sorry.

1 THE COURT: 13? 14?

11:43:32 2 MR. WISE: We have two issues on this instruction.

3 The first is with regard to subparagraph A which says the

4 defendant concealed a fact. We would ask --

11:43:49 5 THE COURT: You want to add the word affirmatively?

11:43:52 6 MR. WISE: I do.

11:43:54 7 MR. POOLE: It's not on the pattern. We think it's

8 unnecessary. It's not a part of the pattern instruction. And

9 frankly, I don't know what affirmatively is going to mean to a

10 juror; does that mean the defendant has to do it himself?

11:44:51 11 MR. WISE: I think our two issues on this are

11:44:54 12 related.

11:44:55 13 THE COURT: I don't think it belongs there.

11:44:57 14 MR. WISE: Okay.

11:44:59 15 THE COURT: If any place, it belongs on the next

16 page under definitions relating to Count 1, and this could be

11:45:13 17 added instead of the second sentence -- no, I'm sorry, after the

18 second sentence, the following could be added: The phrase

19 "conceals or covers up by any trick, scheme, or device" means

20 any deliberate plan or course of action, or any affirmative act,

11:46:07 21 or any knowing omission, designed to deceive others by

11:46:14 22 preventing or delaying the discovery of information.

11:46:18 23 MR. WISE: I think that clarifies the issue.

24 THE COURT: That comes from federal jury

25 instruction practice.

11:46:25 1 MR. POOLE: Works for us.

11:46:27 2 MR. WISE: And for us.

3 THE COURT: I would add that after the sentence: A
4 fact is material.

11:46:53 5 MR. BALLANTINE: Your Honor, as a housekeeping
6 matter, would then that first sentence be redundant in terms of
7 a scheme or device?

11:47:02 8 THE COURT: No.

11:47:03 9 MR. BALLANTINE: And the Nuclear Regulatory Agency
10 Commission, "Agency" should be stricken.

11 THE COURT: You're correct, "Agency" should be
12 stricken.

11:47:29 13 MR. WISE: Judge, our other concern with the A
14 through F paragraphs is there's no --

11:47:36 15 THE COURT: We're on page 14?

11:47:40 16 MR. WISE: Yes. There's no definition of the
17 requisite intent. I don't think that the definitions capture
18 that either. So we would ask the Court to instruct the jury --
19 I actually agree with the government's position yesterday that
11:47:55 20 our proposed instruction, which was the defendants acted with a
21 specific intent to violate the law -- we had proposed something
22 that said specific intent to violate the law by deceiving the
23 NRC. I would agree that the middle clause of that is not
11:48:16 24 warranted, but I do think the Court does need to instruct the
25 jury in order that they understand what they need to find that

11:48:23 1 the defendants acted with a specific intent to deceive the NRC,
2 which I think is true as a matter of law. And I don't think
3 that the instructions as they now read capture that the
4 defendants must be found, in order to be liable for a criminal
11:48:42 5 offense, to have acted with a specific intent to deceive.

11:48:48 6 THE COURT: One moment, please.

11:50:28 7 No, I disagree with you. And I'll tell you why I
8 disagree with you. I think that that's covered by the
11:50:41 9 recitation of the paragraphs in order, fourth, that the
10 defendant did so knowingly and willingly. You cannot do
11 something knowingly and willingly without implicitly having the
12 intent to do it.

11:50:57 13 MR. WISE: I'm not sure I agree. I think the jury
11:51:00 14 could see the greensheet and say, I believe that Mr. Geisen, for
15 example, said he read 2731, he knowingly allowed it to go to the
11:51:09 16 NRC, he willfully allowed it to go to the NRC, so that satisfies
17 four, then I move on to five, and it's a material fact.

11:51:16 18 Nowhere in there does it say to the jury that they need to find
19 that he did that act with the intent to deceive, which all of
20 the cases are very clear is an element of the offense. And as
21 this now stands, a jury could read these and read especially in
11:51:34 22 the fourth and fifth paragraphs that that is sufficient. And I
23 think the cases would clearly say that it's not. And without
24 that delineation of what the intent has to be, I think that the
11:51:49 25 instructions don't capture the state of the law.

11:51:52 1 MR. POOLE: May we respond?

11:51:55 2 THE COURT: In a moment. Please don't sit down

3 yet. I think we change the fourth, that the defendant did so

11:52:09 4 with a knowing and willing intent.

11:52:16 5 MR. HIBEY: To deceive.

11:52:18 6 THE COURT: Well, that follows paragraph A.

7 Fourth should read that the defendant did so with a knowing and

8 willing intent.

11:52:30 9 MR. HIBEY: To deceive.

11:52:34 10 THE COURT: We've already said that in paragraph A.

11:52:41 11 MR. POOLE: It's repeated in the definitions on the

12 following page. We would submit that it might be more

11:52:51 13 appropriate to add "intent to deceive" to the sentence in the

11:52:58 14 following page that defines knowing and willfully.

11:53:04 15 THE COURT: I think you're right. What if we

16 changed the term "knowing and willfully" requires proof that the

17 defendant made a statement with the knowledge it was false and

18 with the intent to deceive.

11:54:22 19 MR. WISE: I think I can live with that.

11:54:24 20 MR. POOLE: We agree.

11:54:45 21 MR. WISE: There is one typo, 14, the defendant did

22 so, and with the Court's alterations it will say -- I can't read

23 my own notes, but it now says the defendant did so knowingly and

11:55:02 24 -- it should say willfully.

25 THE COURT: Willfully.

1 MR. POOLE: Your Honor, may I address the Court?

11:55:21 2 The language in the definitions, page 15, says: Requires proof
11:55:29 3 defendant made a statement. And, of course, this isn't a false
11:55:37 4 statement count.

11:55:38 5 THE COURT: You are correct.

11:55:39 6 MR. POOLE: So I think that needs some work.

11:55:50 7 THE COURT: Wouldn't that be a written statement?

11:55:56 8 MR. POOLE: I would say requires proof the
11:55:59 9 defendant concealed a material fact intending thereby to
10 deceive.

11:56:16 11 THE COURT: You're talking about the fourth
12 paragraph?

11:56:20 13 MR. POOLE: Fourth paragraph. It looks like it's
11:56:24 14 really drafted for a false statement count. I'm just now
11:56:30 15 focusing on that fact.

11:56:36 16 MR. HIBEY: I thought it was a false statement
17 count that was charged under 1001, that it was under the first
11:56:43 18 section of 1001, and that as the government argued before, that
19 it was an offense that carried with it the additional element of
11:56:53 20 affirmative concealment that purportedly distinguished it from
21 Counts 2, 3, 4, and 5, that the count which we're talking about
11:57:04 22 here addresses 2731. So I don't understand exactly what's
23 being said here, but that it would appear to me that all of the
24 elements of the offense of false statement plus concealment need
25 to be addressed in Count 1.

11:57:24 1 THE COURT: Well, false statement clearly can mean
11:57:28 2 oral or written; it does not have to be oral.

11:57:34 3 MR. HIBEY: Well, we have to go to the indictment.
4 The indictment is talking about 2731.

11:57:41 5 MR. BALLANTINE: Your Honor, the indictment is
6 talking about a period of time spanning the time 2731 was filed
7 through February of 2002.

8 THE COURT: That's the period of time in the first
9 count.

11:57:52 10 MR. BALLANTINE: It's a period when materials were
11 kept back, intentionally kept back from the NRC that's charged.
12 So respectfully, Counsel, it's not just 2731. It's anytime
13 that a plan was used to deceive the NRC by keeping information
11:58:08 14 from it.

11:58:21 15 THE COURT: (a)(3) reads as follows, of 18, United
11:58:30 16 States Code 1001: Makes or uses a false writing or document
11:58:36 17 knowing the same to contain any materially false, fictitious, or
11:58:41 18 fraudulent statement or entry.

11:58:47 19 MR. BALLANTINE: But (a)(1) is knowingly and
11:58:50 20 willfully falsifies, conceals, or covers up by any tricks,
11:58:54 21 scheme, or device a material fact. That's the language that's
11:58:57 22 charged in the first count. So it's not a false statement or a
23 false writing count.

11:59:04 24 MR. HIBEY: So we don't have a count on 2731; is
11:59:07 25 that what you're saying?

1 MR. BALLANTINE: 2731 is --

11:59:10 2 THE COURT: Part of --

11:59:11 3 MR. BALLANTINE: -- the concealment scheme.

11:59:13 4 THE COURT: -- the concealment.

5 MR. POOLE: It is one of the tricks, schemes.

11:59:21 6 MR. BALLANTINE: There is not a count that

11:59:23 7 separately charges 2731 as a false writing; Counsel's correct

8 about that.

11:59:33 9 MR. WISE: Judge, I do think this discussion

10 filters us back in the multiplicity issue.

11 THE COURT: It may, but we've already ruled on

12 that.

11:59:42 13 MR. WISE: But it can, I think, affect the way the

11:59:46 14 Court charges the jury.

12:02:16 15 THE COURT: I have two alternatives: One, the term

12:02:22 16 "knowingly and willfully" requires proof that the defendant

12:02:26 17 concealed or misrepresented information with the knowledge it

12:02:30 18 was false and with the intent to deceive; or, two: The term

19 "knowingly and willfully" requires proof that a defendant acted

20 with knowledge of the falsity of his actions and with the intent

21 to deceive. I like the first one better.

12:02:50 22 MR. WISE: I do, too.

12:02:51 23 MR. BALLANTINE: Your Honor, could you read the

24 first one again, please?

12:02:57 25 THE COURT: The term "knowingly and willfully"

1 requires proof that the defendant concealed or misrepresented
12:03:03 2 information with the knowledge it was false and with the intent
12:03:06 3 to deceive.

12:03:07 4 MR. BALLANTINE: The only thing that I quibble with
5 there is the holding back information that was true. So holding
6 back information that was false, I don't know if it suggests --

7 THE COURT: That's misrepresenting.

8 MR. BALLANTINE: Pardon?

9 THE COURT: That's why it says misrepresented, or
10 we could add --

12:03:30 11 MR. BALLANTINE: Knowledge that the information was
12 false, is that the same as information being kept back,
13 concealed?

12:03:47 14 THE COURT: We can't get misrepresented in that
12:03:50 15 sentence.

16 MR. BALLANTINE: Right. So the defendant acts with
17 the -- knowingly conceals information, knowing that the
18 information was false. I mean, information is -- by way of
19 example, if the information that was concealed was that 2000
12:04:12 20 work prevented work on the head inspection, the defendant knows
21 that information to be true, and keeps it back.

12:04:21 22 THE COURT: If it's false, it's a misrepresentation
23 of the truth.

12:04:26 24 MR. BALLANTINE: Maybe I'm spinning --
25 THE COURT: I think you're tilting windmills.

1 You're still standing.

12:04:51 2 MR. WISE: The issue on paragraph 15 deals with the
3 definition of material. That goes back to the discussion we
4 had about paragraph 12 in the indictment, which is incorporated
5 by reference into each count in which the government indicted
6 this case on the theory based on the representations contained
7 in the serial letters, the NRC allowed the plant to stay open.
12:05:11 8 What is in the instructions is pulled from the pattern
12:05:15 9 instructions, but what is in the indictment and what these
12:05:19 10 defendants were given notice they were to defend against, has
12:05:22 11 made that specific allegation part of the charges. And so I
12 don't know whether the proper resolution is to change the
13 definition of material, or to add a specific reference to, in
14 this case, the government has alleged that based upon the
12:05:41 15 representations the NRC acted in a certain way. This is no
16 longer a case where the relevant standard is whether the
12:05:51 17 information had the ability to deceive or to affect a decision
12:05:55 18 because the government --

19 THE COURT: We really hadn't gotten to page 15 in
20 completion. I see now that my notes indicate that I felt we
12:06:03 21 should insert after the second paragraph: In this case a fact
12:06:08 22 is material if it influenced a decision of the NRC.

12:06:16 23 MR. WISE: I think that's accurate and appropriate.

12:06:21 24 MR. CONROY: Your Honor, we agree.

12:06:27 25 THE COURT: That's the whole gravamen of the case;

1 is it not, Mr. Poole?

12:06:35 2 MR. POOLE: However, it's not an element of the
3 offense. To the extent it suggests it is --

4 THE COURT: It's a definition relating to Count 1.

12:06:44 5 MR. POOLE: I think it's a true statement that the
6 fact that the NRC relied is evidence of materiality, but proof
7 of materiality does not require proof of that they were
12:06:56 8 influenced. I think that's the point I would make.

9 THE COURT: I think the whole case is influenced,
12:07:01 10 and that's the materiality. If it was immaterial and didn't
11 influence, then they're not guilty.

12 MR. POOLE: Well, the problem I have with that is
12:07:13 13 these defendants' counsel will no doubt argue that the decision
12:07:23 14 the NRC made wasn't based on the misrepresentations by these
12:07:30 15 defendants but on other things. So imposing on the government
12:07:34 16 the burden of proving that the agency's decision, that Mr.
12:07:44 17 Sheron's decision, was based on the various statements that Mr.
18 Cook put into the Serial Letters misrepresents, I think, the
19 government's burden of proof. It suggests that the government
20 must prove that the NRC relied on the very statements that Mr.
21 Cook put into the Serial Letters. That's simply not the
22 burden.

12:08:16 23 THE COURT: You merely have to prove that they
12:08:19 24 lied?

12:08:20 25 MR. POOLE: That they concealed, and it was as to a

1 matter which had the capability of influencing the agency or was
2 the sort of fact which could influence the agency, but not that
3 it actually did influence the agency.

12:08:34 4 MR. WISE: Judge, that's now how this case has been
5 presented; it's how it was indicted; it's the theory that went
6 to the grand jury.

7 MR. POOLE: Actually, Your Honor, we would
12:08:44 8 respectfully disagree with that statement and also point out
12:08:49 9 that the charging language in the indictment, the specific
12:08:57 10 counts, the charging language does not state the NRC --

12:09:00 11 THE COURT: The charging language says nothing
12 about influencing a decision of the NRC.

12:09:18 13 MR. WISE: Paragraph 12 on page 5 says: Based on
12:09:21 14 the information contained in the Serial Letters, the NRC agreed
15 to FENOC's proposal that it be allowed to operate Davis-Besse
16 beyond December 31st. Paragraph 15 on page 5 says these
12:09:32 17 introductory allegations are hereby realleged and incorporated
18 by reference in Counts 1 through 5 of this indictment.

19 It is incorporated into every count, and that's how
12:09:44 20 the government's tried this case. That's what we were told we
12:09:47 21 were defending against. I don't think there's ever been a
22 question. And I think the Court's right when it says the
12:09:52 23 government's gravamen of this case has been these statements
24 induced the NRC to act.

25 THE COURT: While the Sixth Circuit doesn't have a

12:10:01 1 pattern instruction on it, the Seventh Circuit does. They have
2 two alternatives: One, a fact is material if it has a natural
12:10:14 3 tendency to influence or is capable of influencing the decision
4 of the agency. However, whether a fact is material does not
12:10:25 5 depend on whether a course of action intended to deceive others
12:10:29 6 actually succeeded.

12:10:32 7 MR. WISE: And I think that that --

8 THE COURT: And two, if you will: A statement is
9 material if it had the effect of influencing the action of the
10 NRC or was capable of or had the potential to do so. It is not
11 necessary that the statement actually have that influence or be
12 relied on by the NRC, so long as it had the potential or
13 capability to do so.

12:10:57 14 MR. WISE: But, Judge, I think those instructions
12:10:59 15 reflect the cases where the government put on a case where a
16 person has made a false statement to a government agent or where
12:11:08 17 the government agent knew that the statement was false at the
18 time it was made, and the defendant said, well, I can't be
12:11:13 19 convicted of this because the agent knew that what I was saying
20 was false and didn't rely upon it. And there are cases out
21 there where the Courts have held a statement is material if it
22 has the capability of influencing. But that statement is
12:11:25 23 material for that purpose. That's not what you have here.

24 You have a situation where the government has
12:11:30 25 alleged statements that were made and alleged specifically in

1 the indictment that based on those statements the government
2 agency acted in a certain way and that that allegation has been
3 incorporated in every single count. So while the pattern
4 instruction does reflect the holding of those cases, which were
5 based on a different set of facts, that's not what the Court has
6 in front of it here, and that's not the case this jury's heard.

12:12:00 7 MR. POOLE: We have a response when the Court's
12:12:02 8 ready to hear it.

12:12:59 9 THE COURT: Well, 12 on page 5 of the indictment is
12:13:01 10 incorporated by reference in all the counts: Based on the
11 information contained in the Serial Letters, the NRC agreed to
12:13:10 12 FENOC's proposal that it be allowed to operate Davis-Besse
12:13:16 13 beyond December 31, 2001.

12:13:23 14 MR. POOLE: My turn? What Counsel is doing is
12:13:29 15 taking a paragraph from an introduction and treating it as if it
16 were part of the charging language of the indictment.
12:13:36 17 Paragraph 15 says these introductory allegations are realleged
18 and incorporated in Counts 1 through 5. But they're still
12:13:45 19 introductory allegations. The charging language, we believe,
12:13:49 20 should control the elements that the Court instructs the jury
21 on, and they say, clearly, material facts. And the definition
22 of materiality, as it always has been, capable of influencing a
12:14:10 23 decision. I mean, by extension if the Court were to credit --

12:14:19 24 THE COURT: I think you've already got it in there.
25 I think it's already in there, and the rest of it is subject to

12:14:27 1 oral argument at closing.

12:14:37 2 MR. WISE: Your Honor --

3 THE COURT: We're done. You have your objection.

4 MR. WISE: Can I just say for the record that I do
5 think this rises to the level of a Constitutional issue because
6 the purpose of the indictment is to give notice to the

12:14:49 7 defendants of what they are entitled to defend against. So when

12:14:52 8 we proceed on that notice, I think --

12:14:55 9 THE COURT: You're very right. And that is why
10 the instruction reads: A fact is material if it has a natural
12:15:03 11 tendency to influence or be capable of affecting or influencing
12:15:09 12 a function entrusted to a governmental agency.

13 MR. WISE: And the government's going to argue in
14 closing: We don't have to show that there was reliance on this
12:15:19 15 by the NRC.

16 THE COURT: And you're going to argue paragraph 12
17 is incorporated into the entire body of the indictment, ladies
12:15:28 18 and gentlemen, and they have not proved that the NRC did, in
19 fact, make these decisions based upon and in reliance upon the
12:15:42 20 Serial Letters.

12:15:45 21 MR. WISE: Okay.

22 THE COURT: Thank you.

12:15:54 23 MR. BALLANTINE: Your Honor, as housekeeping on
12:15:56 24 that page 14, the C, parentheses around the letter C, that
12:16:01 25 should be closed up.

1 THE COURT: I'm sorry; I didn't follow where.

12:16:08 2 MR. BALLANTINE: A, B, C, D, page 14.

12:16:13 3 THE COURT: That should be E.

12:16:17 4 MR. BALLANTINE: F should be E, and the C has extra

12:16:23 5 spaces around it.

6 I'm sorry, while I'm there, Your Honor, just to

12:16:27 7 back up on page 2.

12:16:29 8 THE COURT: Page 2?

9 MR. BALLANTINE: Page 2. It's not substantive, but

12:16:34 10 it's typos. The last paragraph says: After I conclude my

12:16:39 11 instructions, the government, small G for government and capital

12:16:42 12 D for defendants. I don't know if that's the sort of thing you

13 want to hear about or not.

12:16:49 14 THE COURT: We always learn.

12:17:07 15 Page 16?

12:17:20 16 MR. BALLANTINE: Page 16 it should probably be --

17 the fifth one should be an E, and the C should be closed up.

12:17:39 18 THE COURT: Page 17?

12:17:41 19 MR. CONROY: Before we go off page 16, I think that

20 we're more than gilding the lily in the last sentence of page

21 16, last paragraph. Note that the government need not prove a

22 statement actually -- it's that same argument we were having on

23 the last page. Only this now goes back and reinforces that

24 they don't have to prove something that they charged. And that

25 is absolutely unfair.

12:18:19 1 THE COURT: But is it not a correct statement of
12:18:22 2 the law?

3 MR. CONROY: It's a correct statement of the law in
4 the abstract. It is not a correct statement of the law in the
5 fact.

6 MR. HIBEY: The patterns --

12:18:29 7 MR. BALLANTINE: In every count we charge that the
12:18:31 8 statement was material. In every count it says these
9 statements were made and they were material. That's the
10 charge. In the introductory paragraph we offered some
11 information that would prove they were material. But there was
12:18:43 12 other information that the jury's going to have, has heard, to
13 show that what we charge, that the statements were material,
14 was, in fact, the case.

15 MR. HIBEY: Your Honor, the pattern, as Mr. Conroy
12:18:56 16 says, in the abstract this is a statement of the law. But also
12:19:03 17 we must take into account the notice that was given to us as to
18 how we were charged and what we must defend. And paragraph 12
12:19:16 19 may now be sloughed off as an introductory paragraph, but, in
20 fact, it's incorporated into each of the counts of the
21 indictment. That takes us from the abstract propositions of
12:19:32 22 cases that were relied upon to use the language about
12:19:39 23 materiality and the capacity to influence. We're now down to a
12:19:45 24 very, very concrete set of circumstances, one in which we are
25 told that -- in paragraph 12, that based on the information

12:20:02 1 contained in the Serial Letters, the NRC agreed to FENOC's
12:20:08 2 proposal that it be allowed to operate Davis-Besse beyond
12:20:12 3 December 31st. It is the materiality of this statement that we
4 must now assess and be -- and instruct upon. That is the rub.

5 This is not a question anymore of the abstractness
6 of what materiality can be and what the case law has embraced in
7 the jurisprudence. We are now talking very specifically about
8 them handing an indictment up to us, our pleading not guilty,
9 and them going back and defending on the basis of these
12:20:51 10 allegations, allegations which have been -- I wanted to use the
11 word import, but incorporated into the very charges of each one
12 of these counts. It's no longer a matter of capacity to
12:21:07 13 influence or the probability that somebody could be influenced,
14 even if they don't follow the influence. The reality is in
12:21:16 15 paragraph 12 that they are telling us, the defendants, that the
12:21:24 16 information in the Serial Letters was the basis upon which the
17 NRC acted.

12:21:34 18 THE COURT: If you look at Count -- I just opened
19 the indictment to Count 5. Count 5 merely says that they knew
20 that the statement contained in the count on the last page of
12:21:49 21 the indictment was false.

12:21:53 22 MR. CONROY: But that doesn't answer the
12:21:55 23 materiality element.

12:21:59 24 THE COURT: As to that charge.

12:22:02 25 MR. CONROY: No, the way they answered the

1 materiality element is by incorporating it from the earlier
12:22:08 2 language.

3 MR. HIBEY: Paragraph 16 on page 5 is the
12:22:14 4 incorporation of 1 through 14 into Count 5. Count 4, Count 3,
12:22:24 5 Count 2, and Count 1. That is what we've been defending. And
12:22:28 6 for them now to come in and argue that the pattern instruction
12:22:33 7 which allows for a more expansive interpretation of what
12:22:37 8 constitutes materiality is a departure, indeed a variance from
9 the indictment. And that variance is material.

10 MR. POOLE: May we respond, Your Honor?

12:22:58 11 THE COURT: Go ahead.

12:23:00 12 MR. POOLE: If the Court were to credit this
13 argument, the paragraph in the introduction must, because it's
14 in the introduction also, be elevated to an element of the crime
12:23:15 15 that's charged, what about the other paragraphs? Are they also
12:23:19 16 elements? I mean, it's an absurd proposition that including a
12:23:24 17 factual allegation in the introduction thereby makes that fact
18 an element of the offense. That's just not the way the law
12:23:33 19 works.

12:23:37 20 MR. HIBEY: The indictment is the notice to the
21 defendants on how -- on what the charges are. The introductory
22 language is there presumably for a very important purpose, and a
12:23:51 23 purpose so important that in paragraph 15 they don't say to you,
24 okay, stop here and don't regard it anymore. They incorporate
12:24:03 25 it into the very count.

12:24:05 1 And, I mean, when Mr. Wise says this is a
12:24:09 2 Constitutional dimension, I believe that's correct because
3 that's how we are put on notice; that's what brings us into the
4 courtroom. That's why we were arrayed with the magistrate
12:24:21 5 reading the entire indictment to us. I mean, there's no
12:24:24 6 question but that this is a situation in which they have
12:24:30 7 absolutely specified what the basis of the action is, and it's
12:24:41 8 contained in that paragraph, and it's included in every one of
9 the counts of the indictment.

12:24:46 10 THE COURT: It is my belief that the first 15
12:24:51 11 numbered paragraphs of the indictment, by being incorporated
12:24:54 12 into each count, that they become the same as their legend is;
13 that is, introductory as to each count, and that the count
14 itself contains the charges as to which the defendants are to
12:25:16 15 respond. So I'm going to leave that language in.

12:25:21 16 MR. CONROY: I know you don't want me to do this.

17 THE COURT: That's all right.

12:25:25 18 MR. CONROY: But worst case scenario for us, this
19 is surplusage. We don't need this twice. This last sentence
20 on page 16, we don't need to do that to us twice. You've
21 gotten this in about what they don't have to prove in the
12:25:42 22 earlier --

12:25:43 23 THE COURT: On page 15?

12:25:45 24 MR. CONROY: On page 15. Let's not do it to us
12:25:49 25 twice.

12:25:50 1 MR. HIBEY: It doesn't cure my objection.

2 MR. CONROY: I understand that.

3 THE COURT: Well, your objection is to everything

12:25:57 4 then. You already passed 15. Now we're going back to 15?

12:26:03 5 We don't work that way, Mr. Hibey.

6 MR. HIBEY: I'm addressing my objection with

12:26:13 7 respect to what we've just discussed.

12:26:15 8 That's page 16, the last sentence. I didn't want

9 the record to be read, because God knows how it's going to be

12:26:26 10 read by people if it has to be, to suggest that somehow

12:26:30 11 everything we've just said about the notice issues and the

12:26:34 12 variance as embodied in our discussion of materiality is somehow

12:26:39 13 cured by whatever you do to the last sentence on page 16.

12:26:45 14 That's all I wanted to say.

12:26:47 15 THE COURT: I understand that.

12:26:50 16 MR. HIBEY: I'm not a Sixth Circuit practitioner.

12:26:54 17 One thing I'm worried about in the Sixth Circuit is by my

12:26:59 18 silence we waive something. I don't want to do that.

19 THE COURT: I misunderstood the purpose of your

12:27:03 20 statement. I apologize.

12:27:30 21 THE COURT: 17?

12:27:38 22 MR. CONROY: Your Honor --

23 THE COURT: This comes out.

12:27:40 24 MR. CONROY: The last sentence?

25 THE COURT: This will reflect the same changes as

1 on page 15.

12:27:47 2 MR. WISE: I think Mr. Conroy's question was what
12:27:50 3 the Court's final decision was about the last sentence on 16.

4 THE COURT: I'm taking it under advisement.
12:27:58 5 Either side has the ability to object on the record.

12:28:03 6 MR. WISE: 17 is conformed to changes we made in
12:28:08 7 15? We don't have any other objection.

12:28:12 8 THE COURT: We're going to stop for a few minutes.
12:28:15 9 I have to go next door for a criminal case.

12:28:27 10 (Recess taken).

12:28:32 11 THE COURT: My understanding is that the following
12:28:35 12 exhibits have not been moved for admission or admitted by the
13 Defendants: 1, 2, 3, 4, 7, 14 through 16.

12:29:06 14 Cindy, do you agree?

12:29:08 15 THE CLERK: I don't have 5, Judge.

12:29:10 16 THE COURT: I have it admitted on October 11
17 without objection.

12:29:14 18 MR. WISE: I believe that's right. I believe it
19 was admitted through Mr. Moffitt.

12:29:20 20 MR. GORDON: We don't have 6.

12:29:22 21 THE COURT: I have that admitted on the 19th, last
22 Friday. Do you, Cindy?

12:29:32 23 THE CLERK: I do have that admitted on the 19th.

24 THE COURT: All of the government exhibits have
25 been admitted where they were used.

12:32:05 1 (Recess taken.)

12:50:23 2 THE COURT: With respect to page 14 and the last
3 sentence, it's my feeling that this is gilding the lily, and I
4 will take that sentence out.

12:50:38 5 MR. CONROY: 16, Your Honor.

6 THE COURT: No, it's 14, and it's on 16 as well.
12:50:46 7 You didn't note it on 14 except inferentially from Mr. Hibey's
12:50:52 8 brilliant exposition.

9 My reasoning is thus: If this paragraph were truly
10 a part of the charge as against introductory, it's my feeling
11 that it should have been contained in the counts alleged. And
12:51:15 12 frankly, if that were the case, would not the government allege
13 that the NRC's decision was solely based on the Serial Letters?
14 And I don't believe that's the gravamen of the case that was
12:51:30 15 presented. I understand what paragraph 12 says, but we'll
16 leave it to the jury to make a determination whether actions by
17 the NRC were in reliance on those letters and the omissions or
12:51:48 18 commissions. And we'll move on to page 18.

12:51:56 19 MR. POOLE: May I have a clarification? With
20 respect to 17, there was a discussion about making changes.

21 THE COURT: We're going to make the changes, but it
22 will not read the same as page 15 because the counts are
23 different.

12:52:14 24 MR. POOLE: One's concealment.

12:52:17 25 THE COURT: Exactly.

12:52:18 1 THE COURT: So this will continue, but where
12:52:21 2 applicable the changes on 15 will be incorporated into 17.

3 MR. POOLE: Specifically the knowingly and
12:52:28 4 willfully?

5 THE COURT: Exactly.

6 Page 18, I agree that the language, proving the
7 defendant's state of mind, could be better said, and I think the
8 word is "determine." And so in the first sentence of page 18,
9 as well as the first sentence of the second -- well, it's the
10 third paragraph, the word "proving" will be changed to
11 "determining", and the word "proved" in the third sentence,
12:53:03 12 first line, will be changed to "determined".

13 Anything else on page 18?

12:53:12 14 MR. WISE: No.

12:53:22 15 THE COURT: The defendant objects to page 19 in
12:53:28 16 totality, and you have already stated your objections in
17 writing.

18 The government has indicated in the third paragraph
12:54:23 19 on page 1 of their memorandum they would like a deliberate
12:54:28 20 ignorance instruction.

12:54:31 21 MR. POOLE: Well, Your Honor, we believe there's a
22 basis for a deliberate ignorance instruction here, a factual
23 basis in the proof of the trial: Mr. Cook's repeating he
24 thought paragraph 1D was about future inspections in the face of
25 its clear language and the understanding of everybody else

12:54:54 1 involved; Mr. Geisen's failure to recall the numerous warning
2 e-mails he received. I think that there is, as to both
12:55:07 3 defendants, a factual basis for arguing and for an instruction
12:55:12 4 that they deliberately avoided facts which lent to creating a
5 high probability that the submissions and presentations to the
6 NRC concealed material facts and included false statements. I
12:55:40 7 would suggest that in the blanks there be a deliberate ignorance
12:55:46 8 instruction. I can give it back to you again, but we think the
12:55:50 9 blanks ought to be filled in with language similar to what I've
10 just used.

11 So reading it again slowly, that the submissions
12 and presentations to the NRC concealed material facts or
13 included false statements. We would use that language to fill
14 in the blanks and we think it's the appropriate instruction.

12:56:25 15 THE COURT: And you would include that for both
16 defendants?

12:56:28 17 MR. POOLE: Yes, Your Honor.

12:56:42 18 MR. WISE: Judge, if I can, I think that that
12:56:45 19 argument misses what deliberate ignorance is about, and I think
20 it points out why this instruction is so dangerous. Deliberate
21 ignorance or willful blindness is appropriate in a case where
12:57:02 22 there is evidence, affirmative evidence of action, by the
23 defendant to avoid gaining knowledge. And, I mean, I think --
24 well, the examples would be if somebody testified that I took
25 something to Mr. Geisen to show him the information about the

1 past inspections, and he said, I don't want to see that. It's
12:57:24 2 based on action. That's the point that these courts have been
12:57:27 3 making when they were talking about how dangerous it is to give
12:57:30 4 this instruction and slide the statement into negligence.

5 When Mr. Poole says Mr. Geisen's resorted to saying
12:57:39 6 that he didn't remember these warning e-mails, the government's
12:57:42 7 alleging that he had the knowledge through these e-mails, and
12:57:46 8 it's their allegation that he had the knowledge and then made
9 what he knew were statements in contravention of that knowledge
10 that makes it a false statements offense. Deliberate ignorance
11 is -- and I think the cases that we've cited have recognized
12 this -- is a theory of criminal liability inconsistent with
13 actual knowledge.

12:58:06 14 Either you knew it, in which case the instruction
12:58:09 15 is actual knowledge; or you made steps to not gain that
16 knowledge. And there's no evidence of taking steps not to gain
12:58:16 17 that knowledge. There may be evidence that e-mails were sent
12:58:20 18 and that the defendants, you know -- we will certainly argue
19 that this is a situation where there's no evidence that he drew
12:58:29 20 from it what the government now says he should have drawn from
21 it. But there's no evidence that either of these gentlemen
22 avoided, purposely avoided, deliberately avoided gaining the
12:58:40 23 knowledge. That's why the instruction is either called
12:58:43 24 deliberate ignorance or willful blindness.

25 There has to be an act by which you shield yourself

1 from gaining the knowledge that will make you liable.

2 I think as this is given it is very dangerous
3 because it suggests, in essence, that they could convict on a
4 negligence standard, and that's certainly at odds with the law.

5 THE COURT: As a matter of fact, it negates
12:59:05 6 carelessness, negligence, or foolishness.

12:59:11 7 MR. WISE: The way this is going to be argued is to
12:59:14 8 say that these gentlemen should have known. Mr. Geisen
12:59:18 9 specifically got these, quote-unquote, warning e-mails and
10 should have known the significance of these things going into
11 September, 2001. If that is what the jury thinks, he is not
12:59:31 12 guilty. And this instruction suggests otherwise, and that's
12:59:36 13 inappropriate.

12:59:39 14 THE COURT: In the Sixth Circuit, this is a pattern
15 instruction, and the cases have uniformly held that to give this
12:59:51 16 pattern instruction, even if error, is harmless error. The
17 question is, in reviewing the multiplicity of issues presented
18 to the jury, in my mind, is there sufficient basis upon which to
19 give this instruction?

13:00:44 20 MR. WISE: Your Honor, if I could interrupt you.

21 THE COURT: Please don't. Keep the thought.

13:02:20 22 All right, Mr. Wise, please complete your thought.

13:02:24 23 MR. WISE: I just wanted to call the Court's
13:02:27 24 attention to the second column of the case that I handed up this
25 morning, which was the opinion that we cited in the memo last

13:02:33 1 week. This is the Ramos case. It is an unpublished opinion.
13:02:38 2 I think if you look at the second column on page 3, this is the
3 Sixth Circuit dealing with exactly the same issue that you dealt
4 with before, and the Court is right, the Sixth Circuit
5 recognized that giving the instruction where there's sufficient
6 proof of actual knowledge renders the giving of a deliberate
13:02:56 7 blindness or deliberate ignorance instruction as harmless error,
13:03:00 8 but goes on to say it is error to give that instruction in a
13:03:05 9 situation where the theory of liability is actual knowledge,
10 which it clearly is here.

13:03:14 11 THE COURT: I'm concerned about the theory of the
13:03:21 12 case and the theory of the statute and their intermeshing. It
13 would appear to me the entire thrust of this case had to be or
14 was -- I'm sorry, was that Messrs. Geisen and Cook had knowledge
13:03:57 15 of the incomplete nature of the inspections due to the inability
13:04:08 16 to make a complete inspection because of the presence of boric
13:04:16 17 acid deposits on the head of the reactor. If that is the case,
13:04:24 18 then I don't believe it's deliberate indifference; it's actual
19 knowledge and failure to disclose. And I don't see how a
13:04:33 20 deliberate indifference charge -- they may have been
13:04:38 21 deliberately indifferent to their responsibilities, but that's
22 not what the deliberate indifference charge is to reflect.

13:04:49 23 If my summation, if you will, of the totality of
13:04:57 24 evidence was as I've just done it, how can deliberate
13:05:03 25 indifference be a part of it?

13:05:06 1 MR. POOLE: Well, our belief is that while your
13:05:16 2 characterization of the government's case is generally accurate,
13:05:21 3 I could gild the lily, but generally accurate, we think it's the
13:05:26 4 defenses that these defendants raised on the stand that make
13:05:32 5 deliberate ignorance relevant.

13:05:34 6 THE COURT: How is it deliberate ignorance to say
13:05:39 7 on the stand, I didn't know. That's not deliberate ignorance.
8 Deliberate ignorance is in a 2004 case, Shabazz, which says --
13:06:00 9 in that case the agent testified that the defendant admitted she
13:06:09 10 assisted her mother in completing annual accounting reports
11 required by the Veteran's Administration showing the necessity
12 for disability benefits because -- expended for her brother's
13 care and board when, in fact, she knew that the brother was
13:06:37 14 incarcerated. That's deliberate indifference. Here we don't
15 have that. It seems to me that at most they -- you could argue
16 that they were deliberately indifferent to their
13:06:56 17 responsibilities, but that's not deliberate ignorance of the
18 facts. It's the deliberate failure to disclose, and that's not
13:07:09 19 ignorance. I mean, I think it's a non-sequitur here. I just
20 don't see it.

13:07:20 21 MR. POOLE: Let me just explain how we see it.
13:07:24 22 I'm referring now to the unpublished case that Counsel produced.

13:07:29 23 THE COURT: The Marry case?

13:07:37 24 MR. POOLE: Ramos.

25 THE COURT: The Marry case is the underlying case

1 in the '90s which gave rise to these later cases.

13:07:47 2 MR. POOLE: Look at page 3, reading from the
13:07:50 3 beginning of the paragraph: The deliberate ignorance charge is
4 appropriate where evidence shows the defendant attempted to
5 escape conviction by deliberately closing his eyes to the
6 obvious risk that he is engaging in unlawful conduct.

13:08:05 7 Here we would say, for example, the offense is
8 concealment of material fact or making a false statement. We
9 believe Mr. Cook closed his eyes to the obvious risk that he was
10 drafting pleadings that concealed material facts and that
13:08:34 11 contained false statements. Now, what's the evidence that he
13:08:37 12 deliberately closed his eyes? Well, his own testimony that he
13:08:40 13 thought -- implausibly that he thought that that question was
13:08:44 14 about future inspections. He's avoiding the knowledge that, in
13:08:52 15 fact, that submission concealed material facts about impediments
16 to inspection, about problems of past inspection, about failure
17 to comply with Boric Acid Corrosion Control, with this
13:09:13 18 conclusion in writing about future inspections.

19 THE COURT: I'm with you until you had said the
20 known risks. It's not the risks which are on trial here. It
21 is the statements which are alleged to be false or misleading,
22 not the risks that the omitted material could create. Am I
23 correct?

13:09:46 24 MR. POOLE: This language about risk, I'm echoing
25 the language in the case. So the language in the case says the

1 failure -- that the defendant attempted to escape conviction by
13:10:00 2 deliberately closing his eyes to the risk he was committing a
13:10:03 3 violation. We think that's just what he did.

13:10:20 4 THE COURT: I want to think about it. I want to
5 point out to all parties the footnote or the use note, as it's
6 called, of the pattern instruction, 2.09 in the Sixth Circuit
13:10:35 7 pattern jury instructions, quote, "This instruction should be
13:10:38 8 used only when there is some evidence of deliberate ignorance."

13:10:46 9 MR. POOLE: We know it well.

13:11:00 10 THE COURT: I'll request that you tear out one of
11 your pages and complete those blanks on page 19 and I will,
13:11:13 12 during our break, make a determination of how we will treat it,
13 and then whoever is the loser on page 19 will have a right to
14 object.

13:11:30 15 MR. POOLE: Thank you, Your Honor.

13:12:04 16 THE COURT: Page 20? Page 21? Off the record.

13:12:43 17 (Discussion had off the record.)

13:12:46 18 THE COURT: Page 21? Page 22 comes out. Page
13:12:59 19 23? Page 24? Page 25? Page 26? And page 27 other than
20 the verdict form itself?

13:13:21 21 MR. BALLANTINE: Your Honor, I believe there may be
22 a pattern instruction when defendants do testify. Do you
23 intend to give that? I don't have it right in front of me.

13:14:17 24 THE COURT: I do. 702-B reads as follows: You
25 have heard the defendant testify. Earlier I talked to you

1 about the credibility or believability of the witnesses, and I
13:14:28 2 suggested some things for you to consider in evaluating each
3 witness's testimony. You should consider those same things in
13:14:37 4 evaluating the defendant's testimony.

13:14:38 5 I think that will go in.

13:14:42 6 MR. WISE: That's fine.

13:14:49 7 THE COURT: Thank you very much. It should go
13:15:17 8 after page 8.

13:15:20 9 MR. WISE: That's fine.

13:15:38 10 MR. POOLE: I don't know if we're done, but I
11 wanted to tell the Court that the -- there is no instruction
12 about Section 2, causation, under 18 U.S.C. Section 2. I think
13 the government's okay with that, but I wanted to call it to the
14 Court's attention because it is pled in the indictment and it
15 could be argued on the closing. If the Court wants to include
16 an instruction, we have a pattern here we can hand up.

13:16:11 17 THE COURT: May I see it, please?

13:16:13 18 I don't believe it was in your offer, was it?

19 MR. POOLE: No, it was not.

13:16:18 20 MR. WISE: We had assumed it wasn't included
13:16:25 21 because there was no evidence of it.

13:16:27 22 THE COURT: I have two instructions, one is the
13:16:29 23 Seventh Circuit pattern, which is short. The other is the
24 Sixth Circuit pattern, which is long.

13:16:34 25 Well, you know which one we're going to use if we

13:16:39 1 use it.

2 MR. POOLE: I prefer short, Your Honor. The one we
3 would think would be relevant, not aiding and abetting, but the
4 causation.

13:17:25 5 THE COURT: Causing an act?

13:17:27 6 MR. POOLE: Yes.

13:18:17 7 THE COURT: I would challenge you to fill in the
8 blanks on 401-A of the Sixth Circuit pattern instructions in
9 this case.

13:18:27 10 MR. POOLE: Yes, Your Honor, it's a puzzler.

13:18:29 11 THE COURT: I don't know how you could do it, so
13:18:33 12 I'm not going to give it.

13:18:36 13 MR. POOLE: The Seventh Circuit instruction simply
14 restates the statute.

15 THE COURT: We've already said that. You can
13:18:44 16 argue that. All right.

13:18:48 17 MR. WISE: Two more issues.

13:18:50 18 THE COURT: Let's move.

13:18:52 19 MR. WISE: The first is on page 20, the expert
20 testimony language. I notice that the Court has included Mr.
13:19:04 21 Holmberg along with Mr. Davis as witnesses that were offered by
13:19:08 22 the government, independent witnesses, not NRC employees. I
23 don't recall that being the case with Mr. Holmberg. I think
13:19:14 24 the issue was with Mr. Davis because of his divergence with the
13:19:21 25 position taken by the NRC.

1 THE COURT: I may have been mistaken, but I thought
2 Holmberg was not appearing as an employee of the NRC. I could
3 have been thinking of Davis.

13:19:35 4 MR. POOLE: His posture is exactly the same as that
13:19:39 5 of Mr. Davis. He testified as to his own opinions, and it was
6 not a finding of the agency.

7 MR. WISE: I just don't think that's a fair
13:19:50 8 representation of what's going on. The reason the instruction
9 was there with Davis was to avoid the specific problem that he
10 was taking a position at odds -- strike that, at odds -- taking
11 a position that the NRC had not ratified. This went back to
12 discussions we've had with the Court in April. How do you
13 handle an NRC witness taking a non-NRC position? The
14 government's position was they would call him in his independent
13:20:20 15 capacity.

16 The point is to let the jury know this is an
13:20:22 17 independent witness; he's not testifying as an agent of the
13:20:27 18 agency. Mr. Holmberg was called, said he worked for the NRC,
13:20:31 19 devalues the impact --

13:20:33 20 THE COURT: They both did. What would be the harm
21 in classifying him as an independent witness giving his own
22 opinion?

13:20:44 23 MR. WISE: Because, Your Honor, he's not
24 independent. He is an NRC witness. The purpose of
25 constructing the instruction for Davis was to deal with the very

1 unique issue that came up with Davis. By putting others in that
13:20:56 2 category it devalues what the Court is telling the jury about
3 Davis, and it actually makes -- it makes the instruction as to
13:21:03 4 Davis somewhat moot in some ways because Davis is different than
5 Holmberg, Your Honor.
13:21:10 6 Holmberg was an NRC witness espousing a position
7 that he gathered in the course of his NRC work that his agency
13:21:17 8 presumably had no argument with, which is not the same case with
13:21:20 9 Davis.
13:21:21 10 THE COURT: Davis gathered his information and his
13:21:24 11 experience through the NRC as well, but testified as an
13:21:30 12 independent whose opinions were not those of the NRC. Was not
13:21:36 13 Holmberg the same thing? And let's stop arguing about it
14 because all we'll do is look at the transcript, and give it to
15 me. Who's got it?
13:21:47 16 MR. WISE: I don't have it, but we can get it for
13:21:49 17 you. We think --
13:21:53 18 THE COURT: You think, but I want to know.
13:21:56 19 MR. POOLE: We have it here in court, Your Honor.
20 THE COURT: I want to know what he testified. If
21 they did not ask him if he was testifying independently, then
22 you are correct. If they did, you are incorrect.
13:22:11 23 MR. WISE: Okay.
13:22:23 24 MR. CONROY: We would like, because Mr. Cook is now
25 through testifying, to join in the proposed defendant's theory

1 of the case instruction, so that we would join in that proposal
2 of Mr. Geisen. It's in the e-mail that was sent to you
13:22:42 3 yesterday. It just needs to be pluralized. It's now singular
4 with Mr. Geisen. We would ask that it be made plural and
13:22:58 5 include both of them.
13:25:22 6 MR. BALLANTINE: Your Honor, I'm looking at page 89
7 of Mr. Holmberg's -- of the transcript pages containing Mr.
8 Holmberg's testimony. I mean, this wasn't the hot-button issue
13:25:39 9 with respect to Mr. Holmberg. I don't think I asked him what
10 his status was.
11 I asked: What were the circumstances of your being
13:25:52 12 asked to review these video inspections that you've now
13:25:55 13 identified and have been admitted?
14 He said: In the course of my job, I've had an
15 opportunity to conduct about a dozen inspections of reactor
13:26:03 16 plants for licensees conducting both visual and non-visual
17 examinations, so I was requested -- our office in the
13:26:10 18 Investigation Branch -- by our office of the Investigation
13:26:15 19 Branch to review the Davis-Besse videotapes, and that was the
13:26:19 20 request that I was asked to do, perform review to determine what
21 information I could ascertain from that with respect to
22 penetrations that were viewable and the condition of the
23 penetration interface areas.
13:26:34 24 I mean, I could keep scouring the transcript. I
13:26:38 25 think the significance here is that Mr. Holmberg was testifying

13:26:42 1 for himself. He said I. I'm confident that the NRC has no
2 position as to how many nozzles -- official position as to how
3 many nozzle penetrations could be seen at one point or the
4 other. I think that the defendant's intent with respect to
13:26:59 5 singling out Mr. Davis with this instruction is to use the
6 instruction to make him appear to be --

7 THE COURT: Can I see that?

13:27:09 8 MR. BALLANTINE: Yes.

13:27:14 9 THE COURT: I know you're a bit rabid, but let me
10 read it first, please.

13:33:16 11 MR. BALLANTINE: If I may suggest an area that
12 would be fruitful, Page 175.

13:33:26 13 THE COURT: I'm just getting there.

13:34:25 14 I don't see anything on 175.

15 MR. BALLANTINE: 174. I got it mixed up. Mr.
16 Wise asked Mr. Holmberg if his review -- at whose request. The
17 answer was the Department of Justice through the Office of
13:34:41 18 Investigational Staff.

19 The next question: Is it fair to say that this is
20 not the type of work -- and by that I mean construction of the
21 table with a nozzle-by-nozzle inspection -- not the type of work
22 that you generally do as a reactor inspector?

13:35:01 23 That's true.

13:35:02 24 He said: You have done approximately 13 prior
13:35:06 25 inspections; is that correct?

13:35:07 1 Yes.

2 And you have not for any of those 13 previously
13:35:11 3 done a nozzle-by-nozzle table like the one you've done in this
13:35:14 4 case, right?

5 And I think the implication is this is not Mr.
13:35:15 6 Holmberg's regular work for the NRC. He's been asked to do it
13:35:19 7 for this investigation. I mean, I don't want to over argue it.
8 I doubt if in the transcript there is an explicit statement from
9 Mr. Holmberg that he's offering --

10 THE COURT: What page was that?

11 MR. BALLANTINE: I see it as 174, Your Honor. I'm
12 not sure if they're all on the same --

13 THE COURT: 174 on mine is redirect.

13:37:04 14 MR. POOLE: When the Court's done reading, we'd
15 like to address it.

13:37:32 16 MR. POOLE: Listening to this argument, I feel like
17 I've entered an alternative reality. This distinction between
13:37:40 18 Davis and Holmberg and their position before the Court is
19 entirely manufactured by defense counsel; it has no basis in
20 fact. Both are people who have regular jobs at the NRC, both
13:37:53 21 Dr. Davis and Mr. Holmberg. Both are employed full-time doing
13:37:57 22 things other than preparing to deliver expert testimony in
23 criminal cases. Both were loaned to the investigation, if you
13:38:07 24 will, by the agency for the purpose of assisting in this case.

25 The reason you don't find in Holmberg's transcript

13:38:17 1 testimony about I'm testifying here as an independent witness
13:38:25 2 and not presenting a finding of the agency or an agency
3 position, the reason it's not there is defense counsel didn't
4 make a fuss about Holmberg. What they sought to do is
13:38:39 5 distinguish Davis so that they could seek to put the Court's
6 imprimatur on an instruction that they thought would undermine
7 his credibility. The reason they're making the distinction
13:38:53 8 here today is they would like the Court to provide an
13:38:56 9 instruction which they'll be able to use as a basis for
13:39:00 10 disregarding Dr. Davis's testimony. We think the distinction is
11 without substance and the Court shouldn't buy it.

13:39:07 12 THE COURT: Well, in looking at the
13:39:09 13 cross-examination by Mr. Wise, your review, he asked Mr.
13:39:29 14 Holmberg: "What you've presented today was conducted at whose
13:39:34 15 request?"

13:39:36 16 "The Department of Justice through our office
13:39:39 17 investigation staff.

13:39:41 18 "Question: And it is fair to say that this is not
19 the type of work -- and by that I mean the construction of a
13:39:49 20 table with a nozzle-by-nozzle inspection -- not the type of work
21 that you generally do as a reactor inspector?

13:39:57 22 "Answer: That's true."

13:40:01 23 As I was impressed by his testimony during the
24 Daubert hearing and his testimony during the case in chief, it
13:40:14 25 appeared to me that both of them were on, if you will, a lending

1 program, were speaking as independent experts, and I believe
2 this stays the way drafted by the Court.

13:40:33 3 MR. WISE: Judge, I know that you get angry at me
4 when I --

5 THE COURT: -- persist.

13:40:39 6 MR. WISE: But I can't believe Mr. Poole is
13:40:41 7 standing here saying we're manufacturing an issue. In April we
8 started talking about Dr. Davis and the unique problem that was
9 presented by an NRC witness who was going to testify to an
10 opinion that the NRC did not endorse. Your Honor had four or
11 five hearings about it. We talked about it on the phone
13:41:00 12 repeatedly, and the Court's resolution of the issue was to give
13 an instruction to the jury saying that this witness was
13:41:06 14 testifying independently from his role at the NRC. That has
15 never been suggested to be the case with Mr. Holmberg.

16 THE COURT: Why? You didn't request it. The
17 defendant's never requested it. That does not mean he was not
13:41:21 18 speaking or testifying as an independent witness just because as
19 to Holmberg you didn't feel it necessary to request that
13:41:31 20 instruction before he began his testimony.

13:41:35 21 MR. WISE: Because there was never a suggestion
22 that Mr. Holmberg was going to take a position at odds with his
23 agency. So it's clear he was an NRC witness testifying that
24 way.

25 What the Court does by putting Holmberg's name in

13:41:49 1 here is it completely devalues the instruction you were giving
13:41:53 2 about Davis and the four months of discussion preceding it and
13:41:56 3 why it was necessary. The government has never suggested that
4 Mr. Holmberg was some independent witness. It's like calling
5 an FBI agent up there and having him say, I reviewed the
6 fingerprints and I think they match the defendants, and having
7 the government say, well, he's not really an FBI agent; he's an
8 independent witness because he used the word "I".

9 THE COURT: Just because you speak fast when I try
13:42:17 10 to talk doesn't mean I'm not going to interrupt you.

11 MR. WISE: I understand.

12 THE COURT: Do you, after all these weeks?

13 MR. WISE: I do.

14 THE COURT: That's nice.

13:42:28 15 Clearly the questions you asked about what he
13:42:31 16 constructed in models or tables was not constructed for the NRC;
13:42:40 17 it was constructed for his testimony here independent of the
13:42:45 18 NRC. And whether the NRC agrees with it or not, he was acting
13:42:50 19 independent of the NRC at the behest of the Department of
20 Justice. At no time did anyone say, is this the opinion, is
21 this the finding of the NRC?

13:43:10 22 MR. WISE: It never would have occurred to me that
23 that was even potentially an issue with Mr. Holmberg.

24 THE COURT: I've made my ruling.

13:43:17 25 MR. CONROY: You were also considering whether we

1 could join in defense theory. We just want to be in.

2 THE COURT: You are.

13:43:28

3 MR. HIBEY: May we complete the record on this
4 point, not for you to rule differently, but for us to complete
5 the record?

13:43:36

6 THE COURT: I thought we already did. We
7 exhausted the record.

13:43:43

8 MR. HIBEY: No, we didn't. The government
9 identified Holmberg as its witness. It identified Davis as its
10 witness, and it did so in correspondence with us. Then the
11 Exponent Failure Report came into the picture. That set off a
12 series of discussions with the Court, which we need not rehearse
13 again. There came a time, however, when they, the government,
14 had to respond to the situation at the Court's urging as to what
15 they were going to do with respect to expert witnesses. They
16 sent a letter, I believe the Court was either the addressee or
17 copied, in which they identified Davis, and Davis only, as
18 someone who was testifying not as an employee of the Nuclear
19 Regulatory Commission, and said nothing with respect to
20 Holmberg, who continued to be proffered as an expert from the
21 Nuclear Regulatory Commission.

13:44:27

13:44:37

13:44:44

13:44:54

13:44:56

13:45:00

22 There was never a situation in which Holmberg was
23 ever anything other than an NRC employee testifying as an NRC
24 employee before the Commission. The transcript upon which the
25 Court is relying goes to the question of what the technique was

13:45:14

1 that Mr. Holmberg, Dr. Holmberg, was using, not what his status
2 was.

13:45:33 3 As Mr. Wise has pointed out, it's impossible for
4 any expert to testify in other than the first person singular as
5 to what he has done, but it does not divorce him from the
13:45:49 6 reality of his employment. And that's the case of Holmberg.
7 The divorce of Dr. Davis from his employment was in response to
8 a situation as it evolved, and then as it was expressed. So
9 there is a very distinct difference between the two, and they
13:46:12 10 were treated accordingly. So I wanted to say that for the
11 record.

12 THE COURT: I want to stop you because you may have
13 seen me writing even before you started to speak. I'll tell
13:46:28 14 you what bothers me. And you did remind me that the Davis
13:46:37 15 testimony was perceived to counteract, if you will, the Exponent
13:46:45 16 report. At no time was there any suggestion by anybody, the
17 government or the defendant, that the Court give an instruction
13:47:03 18 before Mr. Holmberg, and that may have been the reason why
13:47:13 19 nobody, direct or cross, or the Court brought out the issue of
20 how he was testifying. So as far as we are all concerned, the
13:47:27 21 issue is moot. It comes out of the instruction because it was
13:47:32 22 never clarified, not because he was testifying either as an
13:47:41 23 independent or a non-independent witness, but because it was
24 never clarified. And that's what's bothering me. So I'm going
25 to take it out. If you folks want to argue on closing

13:47:58 1 argument, have at it.

13:49:14 2 Now, the only other thing we have left, two things
3 that I'm aware of: One is the defense theory of the case, and
13:49:29 4 two is the verdict form. We can do the verdict form after, if I
5 ever get to it, the reading of the jury instructions at the end
6 of today because I will not get that far. They will not have
7 the form with them. I will stop reading after what is now page
13:50:06 8 24. When it comes to deliberations, I will wait until after
13:50:18 9 closing argument.

10 Now, am I correct that only one issue remains with
11 respect to the instructions?

13:50:28 12 MR. WISE: Yes.

13:50:35 13 THE COURT: Talk to me about the good faith and the
14 government's theory which begins at the third page, the top of
15 the third page of Mr. Wise's e-mail of last Friday, 10-22-07 at
13:51:00 16 3:01 p.m. -- I'm sorry, yesterday, 10-22. Yesterday was the
13:51:07 17 22nd.

13:51:20 18 MR. CONROY: We've got that at paragraph four of
19 Mr. Wise's e-mail.

13:51:28 20 THE COURT: Page 3.

13:51:33 21 MR. BALLANTINE: The fourth numbered paragraph
22 where they start to talk about their defense theory of the case.

13:51:42 23 THE COURT: I don't see any number -- maybe because
24 I stapled it. You are correct. I know it's on the second
25 page.

13:51:56 1 MR. BALLANTINE: I think we're all on the same
13:51:58 2 page, same virtual page.

13:52:02 3 THE COURT: Which approaches some reality.

13:52:16 4 It sounds to me, to be very honest, that I would be
5 giving closing argument for Mr. Geisen and Mr. Cook, since he's
6 joined in this request.

13:52:32 7 MR. POOLE: We'd be more comfortable if defense
8 counsel did their closing argument.

13:52:37 9 THE COURT: I really would. We've said this in a
13:52:43 10 multiplicity of ways, that the defendant acted with intent to
13:52:52 11 deceive. This is to me -- there's a couple of cases which say
13:52:57 12 that in certain instances the defendant is entitled to a good
13 faith reliance, but I think in this case it's very similar to
14 Kelly where they held that the defendant was not entitled to
15 have proposed defense theory of instructions given to jury,
16 better for oral argument.

13:54:12 17 MR. WISE: Your Honor, I pulled that out of the
18 pattern instructions in the good faith --

13:54:17 19 THE COURT: That's right.

20 MR. WISE: I think the case stands for the
13:54:21 21 proposition, if it's supported by the evidence, the defendant is
13:54:25 22 entitled to an instruction of the case. Nowhere else do we
23 deal with the issue of good faith explicitly as a defense to the
24 charge. And so instead of asking for a separate instruction,
13:54:35 25 we tried to roll it into the defense theory of the case. I

1 think the Court prefaces it with what is normally prefaced on a
13:54:45 2 defense theory instruction, which is: Now I'm going to instruct
13:54:48 3 you on the defendant's position of the case... I don't think
4 there's any sense that the jury's going to be hearing that as an
13:54:55 5 advocate's argument from the bench. I think this accurately
6 states the law and is supported by the evidence.

13:55:25 7 THE COURT: Well, if we're going to give it, we
8 give the whole thing; we won't give your version of it.
9 Because you left out a few lines that are relatively important,
10 such as a defendant does not act in good faith if, even though
11 he honestly holds a certain opinion or belief, that defendant
13:55:49 12 also knowingly makes false or fraudulent pretenses,
13:55:53 13 representations, or promises.

13:55:56 14 MR. WISE: That's in the instructions elsewhere,
15 which is why that was left out of there.

16 THE COURT: But let's keep it in context. That's
13:56:12 17 part of the good faith instruction, and if we're going to follow
18 it, we're going to follow it.

19 MR. POOLE: I would question if there's evidence on
13:56:19 20 which you might predicate a good faith instruction.

21 THE COURT: I think so. And I'll tell you why I
22 think so. As we all know, in most cases a defendant does not
13:56:32 23 take the stand to espouse innocence. In this case it appears
13:56:39 24 that just the opposite occurred, in which the defendants each
13:56:46 25 took the stand to import to the jury that they were acting in

13:56:53 1 good faith, not hiding anything. They may not have used those
13:56:59 2 words, but I think they're entitled to the instruction.
3 Otherwise, why take the stand?

13:57:10 4 MR. POOLE: We're persuaded by that, and we think
5 the pattern instruction is the one you should use.

13:57:21 6 THE COURT: Now, the place it should go -- I
7 believe it should go right after page 18. Would you please take
8 a look? If you disagree, I'm open to where to place it.

13:58:08 9 MR. POOLE: Before the deliberating instruction.

13:58:13 10 THE COURT: Which is out, as I remember.

11 MR. POOLE: Your Honor was going to consider it.
12 We think it's more than an appropriate accompaniment to the good
13 faith instruction. If you give one, you should give the other.

13:58:38 14 MR. CONROY: Your Honor, at the risk of incurring
13:58:43 15 the Court's wrath, the deliberate ignorance instruction and the
16 good faith instruction are not necessarily co-relevant.

13:58:51 17 THE COURT: I know. I understand. But it seems
18 to me that the good faith instruction comes in right after
19 inferring required mental state. It certainly doesn't come
13:59:16 20 after definitions.

13:59:19 21 MR. CONROY: No, no, we don't have any problem with
22 the placement of good faith. What we're suggesting is because
23 there's a good faith instruction does not necessarily --

13:59:28 24 THE COURT: I understand. I thought you were
25 talking about the placement. All right.

13:59:47 1 We'll start on correcting and replicating.

13:59:59 2 What about the exhibits?

14:00:03 3 MR. GORDON: I was hoping you'd raise that again.

14:00:06 4 I have not been told by the government they have any objections,

5 to the ones already in. My list does not precisely match the

14:00:13 6 Court's. We agree on 1 to 4; I would move those at this time.

14:00:18 7 THE COURT: Any objections?

14:00:20 8 MR. POOLE: We object to 3. The transcript, I

14:00:28 9 believe, was used in impeachment. I don't believe there's a

14:00:32 10 basis for introducing it.

11 THE COURT: I don't think 3 comes in.

12 MR. POOLE: An interview report. No, I think that

13 was a transcript.

14:01:40 14 THE COURT: I have Defendant's Exhibit Number 5 as

15 12 RFO day 29 in your book.

14:01:48 16 MR. BALLANTINE: We're talking about Defendant's

17 Exhibit 3, Your Honor.

14:01:52 18 MR. GORDON: We're talking about 3 right now, not

19 5. Five is in.

14:01:57 20 THE COURT: Three, my mistake.

14:02:05 21 MR. GORDON: Three was a transcript.

22 THE COURT: I have it.

14:02:10 23 MR. GORDON: Interview of Mr. Sheron.

14:02:31 24 THE COURT: What did we use it for?

25 MR. GORDON: I questioned him about some of the

1 testimony he gave in that interview when I cross-examined him.

2 THE COURT: I'm not going to admit it.

14:02:42 3 MR. POOLE: We have no objection to 1, 2, and 4.

14:02:46 4 THE COURT: What about 7? That's the internal RIF
14:02:50 5 3077 report of Sheron by Lloyd on a different topic.

14:03:01 6 MR. POOLE: Again, that's an interview report that
14:03:03 7 was used to cross-examine Mr. Sheron. We don't think there's a
8 basis for its admission.

9 MR. BALLANTINE: Used to cross-examine Mr. Lloyd.

14:03:16 10 THE COURT: Well, it's a report of Sheron.

14:03:18 11 MR. CONROY: It's a report of an interview of
12 Sheron by Lloyd which we used to impeach Lloyd's recollection
13 with. And it was deliberately contradictory to his testimony.
14:03:29 14 We moved it for identification at that time. He testified from
15 it. He conceded that what it said was inconsistent with what
16 he said on the stand, and we therefore would move its admission.

14:03:41 17 MR. BALLANTINE: It's all hearsay, everything
18 that's in there. It was used for its purpose. I don't
19 understand what rule it would come in under.

14:03:52 20 THE COURT: I don't understand what rule. It's
21 hearsay.

14:03:55 22 MR. BALLANTINE: On that basis we --

14:03:59 23 THE COURT: The same as the interview transcript
14:04:02 24 between the OIG and Sheron.

14:04:07 25 MR. CONROY: All right. We'll withdraw that one.

14:04:11 1 THE COURT: The last three are 14, 15, and 16. 14
2 is a film clip of the D-10 flange.

14:04:21 3 MR. HIBEY: That got moved in.

14:04:24 4 MR. GORDON: My record indicates that's in.

14:04:27 5 THE CLERK: That's in.

14:04:28 6 THE COURT: Okay. The next one was an e-mail, 15.

14:04:31 7 MR. POOLE: We object to that on the grounds we
8 believe there was never any testimony to that.

14:04:36 9 MR. GORDON: 15?

10 THE COURT: No, 14 -- 15, you're right.

11 MR. POOLE: We're on 15 now. ,

12 MR. GORDON: I have 15 already in also on October
13 9th.

14:04:47 13 9th.

14:04:50 14 THE COURT: September 26th -- October 9th. We have
15 it used on there. Do you have it in?

14:04:59 16 MR. GORDON: Yes, sir, but I can't vouch for my
17 records. But that's what my list says.

14:05:04 18 THE CLERK: I don't have it, Judge.

19 THE COURT: I don't have it either.

14:05:10 20 I'll admit it.

14:05:16 21 Number 16 is the transcript of Wuokko's meeting
14:05:19 22 with Ulie.

14:05:25 23 MR. POOLE: Same objection as the other transcript.

14:05:28 24 THE COURT: We didn't let any other transcripts in.

14:05:31 25 Why would we leave this in? It's the testimony that is

14:05:35 1 paramount, not the transcript.

2 You'll get me something on your proposal for 19?

14:05:50 3 MR. POOLE: I think I can do that within five

14:05:52 4 minutes.

5 THE COURT: All right. I'll be upstairs.

15:19:49 6 (Recess taken.)

15:19:51 7 (Jury enters the courtroom.)

15:19:51 8 THE COURT: I'm sorry about the delay. I was

9 explaining to Counsel that we have a brand new machine that

15:19:57 10 duplicates faster than our old one, and it took 45 minutes or

11 more to duplicate 30 copies of the jury instructions. I hate

12 to tell you what the old machine would have done with 30 copies.

15:20:15 13 Secondly, try as we do, in the hundreds of cases in

14 which jury instructions are prepared and read, copies given to

15 the jurors, I have yet to find an errorless set of instructions.

15:20:33 16 I will accept that responsibility for errors in advance. And

15:20:38 17 if they are significant errors, we will stop and make a

15:20:43 18 correction. If not, if it's a typographical, spelling, et

19 cetera, please make it on your own.

15:20:49 20 You will have these instructions with you at the

21 end of the case when you deliberate on your verdict. If you

15:20:59 22 decide to make notes at any point on these instructions, which

15:21:04 23 you have and which you will return at the end of the day to be

15:21:08 24 redistributed later, tomorrow morning, please put your initials

25 or your name on the outside so that you get your copy back.

1 All right.

15:21:30 2 Ladies and gentlemen of the jury, you're going to
3 have to bear with me. As you can tell, my voice is less than
15:21:42 4 perfect as a result of this cold. So bear with me. If at any
5 time you cannot understand, I would ask you please hold up your
15:21:53 6 hand.

15:22:03 7 You've now heard all of the evidence. At this
8 point in the trial, it is my duty to give you instructions
15:22:10 9 concerning the law applicable to this case.

15:22:14 10 I will start by explaining your duties and the
11 general rules that apply to every criminal case.

12 Then I will explain some rules that you must use in
13 evaluating particular testimony and evidence.

15:22:29 14 Then I will explain the elements, or parts, of the
15:22:33 15 crimes the defendants -- first one -- are accused of committing.

15:22:41 16 And last, I will explain the rules that you must
17 follow during your deliberations in the jury room and the
18 possible verdicts you may return.

15:22:50 19 After I conclude my instructions, the government
15:22:55 20 and then the defendants will present their final arguments
15:22:59 21 through their respective counsel. If they wish, they may call
15:23:04 22 your attention to any part of these written instructions.

23 Unless they do so, please put these instructions aside and give
24 the attorneys your undivided attention as they present their
25 final arguments, which as you know will begin tomorrow morning

15:23:21 1 at 8:30.

15:23:27 2 It is your duty as jurors to follow the law as I
3 shall state it to you, and to apply that law to the facts as you
15:23:34 4 find them from the evidence in the case. You are not to single
5 out one instruction alone as stating the law, but must consider
15:23:42 6 the instructions as a whole. Neither are you to be concerned
7 with the wisdom of any rule of law stated by me. Regardless of
8 any opinion you may have as to what the law is or ought to be,
15:23:57 9 it would be a violation of your sworn duty to base a verdict
15:24:02 10 upon any view of the law other than that given in the
15:24:06 11 instructions of the Court, just as it would also be a violation
12 of your sworn duty, as judges of the facts, to base a verdict
13 upon anything other than the evidence in the case.

15:24:20 14 Nothing I say in these instructions is to be taken
15:24:30 15 as any indication that I have any opinion about the facts of the
16 case. It is not my function to determine the facts, but rather
17 yours.

15:24:43 18 Justice through trial by jury depends upon the
15:24:47 19 willingness of each individual juror to seek the truth as to the
15:24:52 20 facts from the same evidence presented to all the jurors and to
21 arrive at a verdict by applying the same rules of law, as that
15:25:03 22 law is given in the instructions of the Court.

15:25:06 23 In deciding the facts of this case you must not be
24 swayed by bias, prejudice, or favor as to any party. Our
25 system of trial by jury does not permit jurors to be governed by

1 prejudice, sympathy, or public opinion.

15:25:26 2 The parties to this case, the government, David
15:25:31 3 Geisen and Rodney Cook, and the public in general, expect that
 4 you will carefully and impartially consider all of the evidence
 5 in this case, follow the law as stated by the Court, and reach a
15:25:45 6 just verdict regardless of the consequences.

15:25:50 7 As stated earlier, it is your duty to determine the
 8 facts, and in so doing you must consider only the evidence I
15:26:06 9 have admitted in this case. The evidence in this case consists
 10 of the sworn testimony of the witnesses, regardless of who may
15:26:15 11 have called them, all exhibits admitted for the record,
15:26:19 12 regardless of who may have produced them, all facts which may
 13 have been agreed to or stipulated, and all facts and events
 14 which may have been judicially noticed.

15:26:31 15 When both sides stipulate or agree as to the
15:26:37 16 existence of a fact, you may accept the stipulation as evidence
 17 and regard that fact as proved. You are not required to do so,
15:26:47 18 however, since you are the sole judge of the facts.

15:26:50 19 While you should consider only the evidence in this
 20 case, you are permitted to draw such reasonable inferences from
15:27:01 21 the testimony and exhibits as you feel are justified in light of
15:27:06 22 your common experience. In other words, you may make
15:27:11 23 deductions and reach conclusions which reason and common sense
 24 lead you to draw from the facts which have been established by
 25 the testimony and evidence in the case.

15:27:24 1 At times during the trial I may have sustained
15:27:34 2 objections to questions asked without permitting the witness to
3 answer or, where an answer has been given, may have instructed
15:27:41 4 that it be stricken from the record and that you disregard it
15:27:45 5 and dismiss it from your minds. In reaching your decision, you
15:27:50 6 may not draw any inference from an unanswered question, nor may
7 you consider testimony which has been stricken. The law
15:27:59 8 requires that your decision be based solely upon the competent
9 evidence before you. Such items as I have excluded from your
15:28:08 10 consideration are excluded because they are not legally
15:28:12 11 admissible.

15:28:20 12 Remember that any statements, objections, or
15:28:24 13 arguments made by the U.S. Attorneys or defense counsel are not
14 evidence in this case. Their function is to point out those
15 things that are most significant or most helpful to their side
16 of this case, and in so doing, to call your attention to certain
17 facts or inferences that might otherwise escape your notice.

15:28:46 18 Anything you may have seen or heard outside the
19 courtroom is not proper evidence and must be entirely
15:28:55 20 disregarded.

15:28:56 21 I have said that you must consider all of the
22 evidence. This does not mean, however, that you must accept
23 all of the evidence as true or accurate. As the sole judges of
24 the facts, you must determine which of the witnesses you
25 believe, what portion of their testimony you accept, and what

1 weight you attach to it. You are free to believe everything
2 that a witness said, or only a part of it, or none of it at all.
15:29:32 3 But you should act reasonably and carefully in making these
15:29:37 4 decisions.
15:29:39 5 Let me suggest some things for you to consider in
15:29:42 6 evaluating each witness's testimony.
15:29:46 7 Ask yourself if the witness was able to clearly see
8 or hear the events, or otherwise to acquire knowledge concerning
15:29:58 9 the facts about which he or she testified. Sometimes even an
15:30:04 10 honest witness may not have been able to see or hear what was
15:30:09 11 happening, and may make a mistake.
15:30:13 12 Ask yourself how good the witness's memory seemed
13 to be. Did the witness seem able accurately to remember what
14 happened?
15:30:23 15 Ask yourself if there was anything else that may
15:30:27 16 have interfered with the witness's ability to perceive or
15:30:31 17 remember the events.
15:30:33 18 Ask yourself how the witness acted while
19 testifying. Did the witness appear honest? Or did the
20 witness appear to be lying?
15:30:47 21 Ask yourself if the witness had any relationship to
22 the government or to the defendants, or anything to gain or lose
15:30:56 23 from the case, that might influence the witness's testimony.
15:31:00 24 Ask yourself if the witness had any bias, or prejudice, or
15:31:05 25 reason for testifying that might cause the witness to lie or to

1 slant the testimony in favor of one side or the other.

15:31:16 2 Ask yourself if the witness testified
15:31:20 3 inconsistently while on the witness stand, or if the witness
4 said or did something (or failed to say or do something) at any
15:31:28 5 other time that is inconsistent with what the witness said while
6 testifying. If you believe that the witness was inconsistent,
7 ask yourself if this makes the witness' testimony less
15:31:43 8 believable. Sometimes it may; other times it may not.
15:31:49 9 Consider whether the inconsistency was about something
10 important, or an unimportant detail. Ask yourself if it seemed
11 like an innocent mistake, or if it seemed deliberate.

15:32:07 12 And ask yourself how believable the witness's
15:32:11 13 testimony was in light of all the other evidence. Was the
15:32:16 14 witness' testimony supported or contradicted by other evidence
15:32:21 15 you found believable? If you believe a witness' testimony was
15:32:27 16 contradicted by other evidence, remember that people sometimes
17 forget things, and that even two honest people who witness the
18 same event may not describe it exactly the same way.

15:32:43 19 These are only some of the things you should
20 consider in deciding how believable each witness was. You may
21 also consider other things you think shed some light on the
22 witness's believability. Use your common sense and your
15:33:02 23 everyday experience in dealing with other people, and then
24 decide what testimony you believe, and how much weight you think
25 it deserves.

15:33:16 1 The weight of the evidence is not necessarily
2 determined by the number of witnesses testifying as to the
15:33:25 3 existence or non-existence of any fact. You may find that the
15:33:30 4 testimony of a smaller number of witnesses as to any fact is
15:33:35 5 more credible than the testimony of a larger number of witnesses
15:33:40 6 to the contrary.

15:33:44 7 A witness may be discredited or "impeached" by
15:33:51 8 contradictory evidence, by a showing that he or she testified
9 falsely concerning a material matter, or by evidence that at
10 some other time the witness has said or done something, or has
11 failed to say or do something, which is inconsistent with the
15:34:07 12 witness' present testimony.

15:34:11 13 Inconsistencies or discrepancies in the testimony
14 of a witness or between the testimony of different witnesses,
15:34:22 15 may or may not cause you to discredit such testimony. Two or
15:34:26 16 more persons witnessing an accident or a transaction may see or
17 hear it differently. Innocent misrecollections or failure to
15:34:38 18 recollect are not uncommon experiences. In weighing the effect
19 of a discrepancy, consider whether it pertains to a matter of
15:34:48 20 importance or an unimportant detail, and whether the discrepancy
15:34:53 21 results from innocent error or calculated falsehood.

15:34:58 22 As I said, when a witness is questioned about an
23 earlier statement he may have made, such questioning is
15:35:08 24 permitted in order to aid you in evaluating the truth or
15:35:12 25 accuracy of his or her testimony here at trial.

15:35:18 1 In other words, evidence of earlier statements made
2 by a witness are not received as evidence of the truth or
15:35:27 3 accuracy of such statements, but for the purpose of aiding you
15:35:32 4 in your determination concerning the credibility or weight to be
15:35:37 5 given to the witness' testimony before you at this trial.
15:35:43 6 Whether or not such prior statements of a witness are, in fact,
15:35:47 7 consistent or inconsistent with his or her trial testimony is
8 entirely for you to determine.

15:35:58 9 If a person is shown to have knowingly testified
10 falsely concerning any important or material matter, you
15:36:07 11 obviously have a right to distrust the testimony of such an
15:36:11 12 individual concerning other matters. You may reject all of the
13 testimony of that witness or give it such weight or credibility
15:36:20 14 as you may think it deserves.

15:36:42 15 You have heard the defendants testify. I just
16 talked to you earlier in these instructions about the
15:36:50 17 credibility or believability of the witnesses. And I've
15:36:54 18 suggested some things for you to consider in evaluating each
15:36:58 19 witness's testimony.

15:36:59 20 You should consider those same things in evaluating
21 each defendant's testimony.

15:37:07 22 Now let's talk about the different types of
23 evidence.

15:37:15 24 There are, as I told you in my preliminary
15:37:19 25 instructions, generally speaking, two types of evidence from

15:37:23 1 which a jury may properly find the truth as to the facts of a
2 case. One is direct evidence, such as the testimony of an
15:37:33 3 eyewitness. The other is indirect or circumstantial evidence,
4 the proof of a chain of circumstances pointing to the existence
15:37:42 5 or non-existence of certain facts.

15:37:46 6 As a general rule, the law makes no distinction
7 between direct and circumstantial evidence, but simply requires
15:37:57 8 the jury find the facts in accordance with the evidence in the
9 case, both direct and circumstantial.

15:38:04 10 You are to consider only the evidence in this case.
11 But in your consideration of the evidence you are not limited to
12 the bald statements of the witnesses. In other words, you are
13 not limited solely to what you see and hear as the witnesses
15:38:23 14 testify. In other words, you are permitted to draw, from facts
15 which you find have been proved, such reasonable inferences as
16 seem justified in the light of your experience.

15:38:39 17 Inferences are deductions or conclusions which
18 reason and common sense lead the jury to draw from facts which
19 have been established by the evidence in the case.

15:38:53 20 After weighing all the evidence, if you are not
15:38:59 21 convinced beyond a reasonable doubt of the guilt of each
15:39:02 22 individual defendant, you must find that individual defendant
23 not guilty.

15:39:30 24 The charges in this case, as I told you, and as
25 Judge Armstrong told you earlier, are contained in the

15:39:38 1 indictment. The indictment is not evidence. It is the
15:39:44 2 instrument used to inform the defendant of the criminal act with
3 which he is charged. As such, it may not be considered as
15:39:53 4 evidence or as raising any presumption against the defendant.

15:39:58 5 A plea of "not guilty" has been entered to the
6 indictment by each of the defendants. This plea is a denial of
7 the charges, and puts in issue all the essential elements of the
15:40:13 8 offenses charged and imposes on the government the burden of
15:40:17 9 establishing each of the elements of each offense by proof
10 beyond a reasonable doubt.

15:40:25 11 The law presumes a defendant to be innocent of the
15:40:30 12 crime charged. The law permits nothing but legally admissible
15:40:36 13 evidence presented before the jury to be considered in support
15:40:41 14 of any charge against the accused. The presumption of
15:40:46 15 innocence alone is sufficient to acquit a defendant, unless you,
15:40:53 16 the jurors, are satisfied beyond a reasonable doubt of the
17 defendant's guilt after careful and impartial consideration of
15:41:03 18 all the evidence in the case.

15:41:05 19 It is not required that the government prove the
15:41:12 20 guilt beyond all reasonable -- beyond all possible guilt --
15:41:19 21 doubt -- let me read that over. Let me take a drink of water.

15:41:32 22 It is not required that the government prove guilt
15:41:36 23 beyond all possible doubt. The test is one of reasonable
24 doubt. A reasonable doubt is doubt based upon reason and
25 common sense, the kind of doubt that would make a reasonable.

1 person hesitant to act. Proof beyond a reasonable doubt must,
15:41:57 2 therefore, be proof of such a convincing character that a
15:42:00 3 reasonable person would not hesitate to rely and act upon it in
4 the most important of his or her own affairs.

15:42:09 5 You must remember that a defendant is never to be
15:42:14 6 convicted on mere suspicion or conjecture.

15:42:21 7 The burden is always on the prosecution to prove
8 guilt beyond a reasonable doubt. This burden never shifts to
9 the defendant; for the law never imposes upon a defendant in a
10 criminal case the burden or duty of calling any witnesses or
11 producing any evidence.

15:42:41 12 Unless the government proves, beyond a reasonable
15:42:45 13 doubt, that the defendant has committed each and every element
15:42:49 14 of an offense charged in the indictment, you must find the
15 defendant not guilty of that offense. If you view the case as
15:43:00 16 reasonably permitting either of two conclusions, one of
15:43:04 17 innocence, the other of guilt, you must, of course, adopt the
18 conclusion of innocence and return a verdict of not guilty as to
19 that count.

15:43:16 20 The defendants have each been charged with at least
21 one crime. The number of charges is no evidence of guilt, and
22 this should not influence your decision in any way. And in our
23 system of justice, guilt or innocence is personal and
15:43:42 24 individual. It is your duty to separately consider the
15:43:47 25 evidence against each defendant on each charge, and to return a

15:43:53 1 separate verdict for each one of them. For each one, you must
15:44:01 2 decide whether the government has presented proof beyond a
15:44:05 3 reasonable doubt that a particular defendant is guilty of a
4 particular charge.

15:44:11 5 Your decision on any one defendant or charge,
15:44:15 6 whether it is guilty or not guilty, should not influence your
15:44:19 7 decision on any of the other defendants or charges.

15:44:27 8 That concludes the part of my instructions
15:44:36 9 explaining your duties and the general rules that apply in every
15:44:41 10 criminal case. In a moment, I will explain the elements of the
15:44:47 11 crimes the defendants are accused of committing.

15:44:51 12 But before I do that, I want to emphasize that each
15:44:55 13 defendant is only on trial for the particular crimes charged
15:45:02 14 against him in the indictment. Your job is limited to deciding
15 whether the government has proved the crimes charged beyond a
15:45:09 16 reasonable doubt.

15:45:10 17 Also keep in mind that whether anyone else should
18 be prosecuted and convicted for this crime is not a proper
15:45:21 19 matter for you to consider. The possible guilt of others is no
20 defense to a criminal charge. Your job is to decide if the
21 government has proved each defendant guilty beyond a reasonable
15:45:36 22 doubt. Do not let the possible guilt of others influence your
15:45:43 23 decision in any way.

15:45:45 24 As I stated earlier in these instructions, the
15:45:51 25 defendants have each been charged with separate crimes. The

1 number of charges is no evidence of guilt, and should not
2 influence your decision in any way. Each offense, and the
3 evidence pertaining to it, should be considered separately.

15:46:10 4 The fact you may find the accused guilty or not guilty of an
15:46:16 5 offense charged should not control your verdict as to any other
15:46:19 6 charges. I will at this time point out to you that you have
7 heard and may hear again certain matters repeated more than
8 once. That is because they are important.

15:46:47 9 Count 1 of the indictment is with respect to
15:46:51 10 concealing material information. Count 1 accuses each
15:46:58 11 defendant of concealing material information from the Nuclear
15:47:05 12 Regulatory Commission in violation of federal law. For you to
13 find each defendant guilty of this crime, you must be convinced
14 that the government has proved each and every one of the
15:47:17 15 following elements beyond a reasonable doubt:

15:47:20 16 First, that the defendant concealed a fact by
17 trick, scheme or device;

15:47:28 18 Second, that the fact was material;.

15:47:32 19 Third, that the defendant had a duty to disclose
20 the fact;.

15:47:39 21 Fourth, that the defendant did so knowingly and
15:47:43 22 willfully; and.

15:47:46 23 Fifth, the material fact related to a matter within
24 the jurisdiction of the executive branch of the government of
25 the United States.

15:47:57 1 If you are convinced that the government has proved
2 all of these elements, you must return a guilty verdict on this
3 charge. If you have a reasonable doubt about any one of these
15:48:13 4 elements, then you must find the defendant not guilty as to this
15:48:18 5 charge.

15:48:25 6 Now some definitions relating to Count 1. As you
7 will see, also related to Counts 2 through 5.

15:48:36 8 A "scheme or device" includes any plan or course of
9 action intended to deceive others.

15:48:59 10 A fact is "material" if it has a natural tendency
11 to influence or be capable of affecting or influencing a
12 function entrusted to a governmental agency.

15:49:14 13 The phrase "conceals or covers up by any trick,
14 scheme or device" means any deliberate plan or course of action,
15 or any affirmative, or any knowing omission designed to deceive
16 others by preventing or delaying the discovery of information.

15:49:38 17 The term "knowing and willfully" requires proof
18 that the defendant concealed or misrepresented information with
15:49:50 19 the knowledge it was false and with the intent to deceive.

15:50:00 20 The Nuclear Regulatory Commission, or the NRC as
15:50:03 21 it's been referred to during this trial, is a part of the
15:50:07 22 executive branch of the government of the United States, and
15:50:10 23 facts concerning commercial nuclear reactors are within the
24 jurisdiction of that branch.

15:50:24 25 Counts 2 through 5, false statements:

15:50:36 1 Counts 2 through 5 of the indictment accuse one or
2 more of the defendants of making and using a false writing,
3 knowing it to contain fraudulent statements in violation of
4 federal law. For you to find a defendant guilty of this crime,
15:50:55 5 you must be convinced that the government has proved each and
15:50:59 6 every one of the following elements beyond a reasonable doubt:
15:51:04 7 First, that the defendant made or used a writing;.
15:51:11 8 Second, that the defendant knew the writing
15:51:14 9 contained a fraudulent statement;.
10 Third, that the statement was material;.
15:51:22 11 Fourth, that the defendant made or used the writing
15:51:27 12 knowingly and willfully; and.
15:51:30 13 Fifth, that the writing was made or used in a
14 matter within the jurisdiction of the executive branch of the
15 government of the United States.
15:51:40 16 If you are convinced that the government has proved
17 all of these elements, say so by returning a guilty verdict on
15:51:49 18 this charge, or these charges. If you have a reasonable doubt
15:51:56 19 about any one of these elements, you must find the defendant
15:52:01 20 guilty -- not guilty, that should be, please make that change.
21 Have you each made the change after the word
22 defendant in the last line, put in "not guilty of this charge"?
23 Let me read it again.
15:52:20 24 The last paragraph on page 17: If you are
15:52:25 25 convinced that the government has proved all of these elements,

1 say so by returning a guilty verdict on this charge. And by
15:52:36 2 "this charge", it means you consider each of charges 2 through 5
15:52:43 3 separately. If you have a reasonable doubt about any one of
4 these elements, then you must find the defendant not guilty of
5 the charge.

15:53:04 6 Each of these elements set forth on page 19 -- I'm
15:53:12 7 sorry, 17, and the last paragraph, is directed at charges --
15:53:18 8 separately at charges 2, 3, 4, and 5 of the indictment.

15:53:29 9 Definitions relating to Charges 2 through 5 --
10 Counts 2 through 5.

15:53:38 11 A statement is "fraudulent" if it is known to be
15:53:41 12 untrue, and is made or caused to be made with intent to deceive.

15:53:47 13 A statement is "material" if it has a natural
15:53:52 14 tendency to influence, or to be capable of affecting or
15:53:56 15 influencing, a function entrusted to a governmental agency.

15:54:03 16 The term "knowingly and willfully" requires proof
17 that the defendant made a statement or caused a statement to be
18 made, with the knowledge that it was false with the intent to
15:54:16 19 deceive.

15:54:17 20 Again, remember that the NRC is a part of the
15:54:24 21 executive branch of the government of the United States, and
15:54:28 22 facts concerning commercial nuclear reactors are within the
15:54:33 23 jurisdiction of that branch.

15:54:38 24 Next I want to explain something about determining
25 a defendant's state of mind.

15:54:44 1 Ordinarily, there is no way that a defendant's
2 state of mind can be proved directly, because no one can read
3 another person's mind and tell what that person is thinking.

15:55:01 4 But a defendant's state of mind can be determined
15:55:07 5 indirectly from the surrounding circumstances. This includes
15:55:12 6 things like what the defendant said, what the defendant did, how
7 the defendant acted, and any other facts or circumstances in
15:55:23 8 evidence that show what was in the defendants' minds.

15:55:29 9 You may also consider the natural and probable
15:55:34 10 results of any acts of the defendant -- that the defendant
15:55:38 11 knowingly did, or did not do, and whether it is reasonable to
12 conclude that the defendant intended those results. This, of
13 course, is for you as the jury to decide. The good faith of a
14 defendant is a complete defense to the charges in the indictment
15:56:07 15 because good faith on the part of a defendant is, simply,
15:56:11 16 inconsistent with an intent to deceive.

15:56:14 17 A person who acts, or causes another person to act,
15:56:18 18 on a belief of an opinion honestly held is not punishable under
15:56:23 19 this statute merely because the belief or opinion turns out to
15:56:29 20 be inaccurate, incorrect, or wrong. An honest mistake in
21 judgment or an honest error in management does not rise to the
22 level of criminal conduct.

15:56:41 23 A defendant does not act in good faith, even if he
15:56:47 24 honestly holds a certain opinion or belief, that the defendant
25 also -- I'm sorry. Let me reread that.

15:57:10 1 A defendant does not act in good faith, even though
2 he honestly holds a certain opinion or belief, if that defendant
3 also knowingly makes false or fraudulent pretenses,
4 presentations, or promises to others.

15:57:31 5 While the term good faith has no precise
6 definition, it encompasses, among other things, a belief or
7 opinion honestly held, an absence of malice or ill will, and an
15:57:47 8 intention to avoid taking unfair advantage of another.

15:57:51 9 The burden of proving good faith does not rest with
15:57:54 10 the defendants because the defendants do not have any obligation
15:57:58 11 to prove anything in this case. It is the government's burden
12 to prove beyond a reasonable doubt that the defendant acted with
15:58:07 13 an intent to deceive.

15:58:10 14 If the evidence in this case leaves you with a
15 reasonable doubt as to whether a defendant acted with an intent
16 to deceive or in good faith, you must acquit that defendant.

15:58:27 17 Next, I want to explain something about proving a
18 defendant's knowledge. No one can avoid responsibility for a
19 crime by deliberately ignoring the obvious. If you are
15:58:45 20 convinced that a defendant deliberately ignored a high
15:58:49 21 probability that the submissions and presentations to the NRC
15:58:55 22 concealed material facts or included false statements, then you
15:59:01 23 may find that he knew that the submissions and presentations to
24 the NRC concealed material facts or included false statements.
15:59:13 25 But to find this, you must be convinced beyond a reasonable

15:59:18 1 doubt that the defendant was aware of a high probability that
2 the submissions and presentations to the NRC concerned material
15:59:29 3 facts -- I'm sorry, concealed -- let me read that over. I'm
4 sorry.

15:59:35 5 But to find this, you must be convinced beyond a
15:59:41 6 reasonable doubt that the defendant was aware of a high
7 probability that the submissions and presentations to the NRC
15:59:50 8 concealed material facts or included false statements and that
15:59:56 9 the defendant deliberately closed his eyes to what was obvious.
16:00:02 10 Carelessness, or negligence, or foolishness on his part is not
11 the same as knowledge and is not enough to convict. This, of
12 course, is all for you to decide.

16:00:23 13 An expert witness has special knowledge that allows
16:00:27 14 a witness to give an opinion. You do not have to accept an
15 expert's opinion. In deciding how much weight to give it, you
16 should consider the witness's qualifications and how he reached
17 his conclusions. Remember that you alone decide how much of a
16:00:49 18 witness' testimony to believe, and how much it deserves.

16:00:55 19 Among the experts you have heard was Dr. James A.
20 Davis, who was offered by the government as an independent
16:01:03 21 witness, not in his role as an employee of the NRC. The
22 opinion or opinions of Dr. Davis should not in any manner or
23 fashion be deemed the opinion or opinions of the NRC on the
16:01:19 24 issues as to which Dr. Davis testified in this trial. In
25 short, Dr. Davis testified independently of the NRC and without

16:01:32 1 the endorsement of that agency. You are reminded to treat his
16:01:38 2 testimony as that of any other expert.

16:01:46 3 You have heard testimony of Prasoon Goyal. You
4 have also heard that the government promised him that it would
16:01:55 5 defer prosecuting him in exchange for, among other things, his
16:02:00 6 cooperation.

16:02:02 7 It is permissible for the government to make such a
8 promise. But you should consider Mr. Goyal's testimony with
9 more caution than the testimony of other witnesses. Consider
16:02:14 10 whether his testimony may have been influenced by the
11 government's promise. Do not convict the defendant based on
12 the unsupported testimony of such a witness standing alone,
13 unless you believe his testimony beyond a reasonable doubt.

16:02:37 14 You will note the indictment charges that the
16:02:40 15 offenses were committed "on or about" certain dates. The
16:02:46 16 evidence need not establish with certainty the exact date of an
17 alleged offense. It is sufficient if the evidence in the case
16:02:56 18 establishes beyond a reasonable doubt that the offense was
16:03:00 19 committed on a date reasonably near the date alleged.

16:03:09 20 And, of course, as I told you at the beginning of
21 the case, you have a copy of the indictment with you in the jury
16:03:44 22 room.

16:03:44 23 Change the word "either" on the first line on 25 to
24 "A." Strike "either" and put in "a," please. Have you all
25 done that? Thank you.

16:04:04 1 If, as to a count in the indictment, the government
2 has proved by evidence beyond a reasonable doubt all essential
3 elements of the charged violation as to the defendant, you, the
4 jury, shall find the defendant guilty as to that count of the
5 indictment.

16:04:23 6 There is nothing peculiarly different in the way a
7 jury should consider the evidence in a criminal case from that
8 in which all reasonable persons treat any question, depending
9 upon evidence presented to them.

16:04:42 10 You are expected to use your good sense; consider
11 the evidence in the case for only those purposes for which it
12 has been admitted, and give it a reasonable and fair
16:04:57 13 construction, in the light of your common knowledge of the
14 natural tendencies and inclinations of human beings.

16:05:07 15 If the accused be guilty as to a count in the
16 indictment, say so. If not proved guilty, say so.

16:05:16 17 Keep constantly in mind that it would be a
18 violation of your sworn duty to base a verdict upon anything but
16:05:24 19 the evidence in the case. Remember also that the question
16:05:29 20 before you can never be: Will the government win or lose the
21 case? The government always wins when justice is done,
16:05:39 22 regardless of whether the verdict be guilty or not guilty.

16:05:44 23 The verdict must represent the considered judgment
16:05:49 24 of each juror. In order to return a verdict, on any count, it
25 is necessary that each juror agree thereto. Your verdict must

1 be unanimous.

16:06:10 2 Now at this juncture we're going to put aside these
3 jury instructions. We will take up by repeating page 25
4 tomorrow after closing arguments of all counsel and complete the
16:06:30 5 instructions then.

16:06:34 6 Please remember, we are now at that very critical
7 stage near the end of a case, a criminal case, important to all.
16:06:53 8 Therefore, do not discuss this case among yourselves, nor with
9 anyone else, nor permit anyone else to discuss it with you. Do
10 not watch, listen to, or read anything touching on this case in
16:07:12 11 any way. And do not make up your minds on any issue involved
12 in this case until you are in the jury room after hearing the
16:07:22 13 completion of instructions and the arguments of counsel.

16:07:28 14 Please enjoy your time away this evening. We will reassemble
16:07:37 15 at 8:30 for closing arguments.

16:08:48 16 (Jury exits the courtroom.)

16:08:48 17 THE COURT: I'm going to have pages 17 and 25
16:08:58 18 rerun, and we will slip sheet them in the jury's copies. The
19 change on 17 is obviously the dropping of the word "not" which I
20 had them all write in. I can leave that, which will highlight
21 it, as I'm sure the defense counsel would prefer. Do you
16:09:23 22 wish -- any reason to really change that? They've already
16:09:26 23 written in.

16:09:32 24 MR. HIBEY: If they all put it in, no problem.

16:09:34 25 THE COURT: We will see if they do. If they do,

16:09:38 1 we'll leave it in because that's the way they will expect to
2 find it. If not, we will rerun it.

16:09:46 3 MR. HIBEY: And tell them?

16:09:47 4 THE COURT: And tell them, of course. No, we're
16:09:52 5 going to keep it a secret.

16:10:04 6 THE COURT: Let's take, for my benefit only, a
7 five-minute break. Then I want to address the verdict forms.

16:18:05 8 (Recess taken.)

16:18:05 9 THE COURT: Are you ready to talk about the verdict
16:18:08 10 form? This, of course, is a generic form.

16:18:16 11 MR. WISE: It's fine with us.

16:18:19 12 MR. POOLE: It looks good to us.

16:18:21 13 MR. CONROY: Fine with us, Your Honor.

16:19:17 14 THE COURT: It is the responsibility of counsel for
15 the government and the defendant, each defendant, to make sure
16:19:40 16 that the exhibits which are to be delivered to the jury when
17 they retire to deliberate are complete and appropriate and that
18 no extraneous documents are there. That's your responsibility,
19 and I urge you to take it as seriously as you have anything else
16:20:05 20 in this trial.

16:20:14 21 My sense is that you will not take as long as you
16:20:26 22 say you're going to take, just as you did not take as long in
23 the presentation of evidence as you thought you would. That's
16:20:35 24 not by way of criticism. So if you get done earlier than
16:20:39 25 anticipated tomorrow, I will urge them first to elect a foreman

16:20:44 1 or forelady, and then to deliberate and to advise us when
16:20:51 2 they're ready to go home if they have not concluded their
16:20:54 3 deliberations.

16:20:58 4 I generally give them the option to stay, at which
5 point we will provide them with dinner. Now, if they do not,
16:21:08 6 since they have not been previously sequestered, they will not
7 be sequestered.

16:21:22 8 MR. HIBEY: Could I have an understanding of how
9 that works in the sense that if they wanted to stay until 9:00,
10 they will?

11 THE COURT: Yes.

12 MR. HIBEY: Do they tell us how long they want to
13 stay before they actually do it, or are we just on the hook?

16:21:36 14 THE COURT: Generally, yes. Generally, yes. I
16:21:42 15 will tell you that most of the time, however, if they have been
16 here from 8:30, and do not retire until 4:00 or thereafter, they
17 will elect a foreman and advise that they will go home and start
18 fresh the next morning. That's the general pattern.

19 MR. HIBEY: And they will begin when?

16:22:07 20 THE COURT: 8:30 Thursday morning, or if they say
16:22:12 21 9:00. 8:30 or 9:00 Thursday morning.

22 MR. HIBEY: Do you tell them when their luncheon
16:22:18 23 break is? I'm trying to figure that out for other reasons,
24 obviously.

16:22:22 25 (Discussion had off the record.)

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(Adjourned at 4:22 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

Tracy L. Spore, RMR, CRR

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