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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

DAVID GEISEN'S ANSWER OPPOSING THE NRC STAFF'S PETITION FOR COMMISSION REVIEW OF THE BOARD'S INITIAL DECISION REGARDING THE ENFORCEMENT ORDER AGAINST HIM

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PREFACE

On January 4, 2006, David Geisen was debarred for five years under the authority of an immediately effective order based on the NRC Staff's determination he violated 10 § C.F.R. 50.5(a)(2).[1] After much procedural activity, Mr. Geisen received a hearing on the January, 2006 debarment on December 8-12, 2008.[2] On August 28, 2009 the Initial Decision of the Board (one judge dissenting) was entered in favor of Mr. Geisen and is now the subject of the Staff's appeal and an application for a stay of its immediate effectiveness.

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[1] Two weeks later, he was indicted on five counts for violation of 18 U.S.C. § 1001, 1002. He was subsequently tried, found guilty on three of the five counts, received a probationary sentence, a provision of which was being banned for three years from working in the nuclear power industry. The sentencing judge, Honorable David Katz, stated that if the NRC were to dissolve the debarment, the Court would consider lifting its ban upon application for such relief. *See* Transcript of Criminal Case Sentencing ("Sent. Tr.") at 30:4-16.

[2] Mr. Geisen's "expedited" hearing came after he had already served three of the five years of the imposed ban due in large measure to the five separate requests the Staff made to stay the proceedings. Indeed, the hearing would have been pushed into 2009 had the Board granted the Staff's request for additional discovery. All the while, as the Board noted, "the five-year employment ban has inexorably been having its impact on Mr. Geisen while the wheels of justice grind." *David Geisen*, LBP-09-24, 70 NRC __ (slip op.) at 38 (Aug. 28, 2009) ("Decision") (emphasis in original).

This Petition for Review ("Petition") should be denied. The Staff must show that the Board's fact finding was clearly erroneous, *i.e.* not even plausible according to the record in its entirety, or that the Board departed from established law when it declined to apply collateral estoppel in this matter, based on Mr. Geisen's criminal case.[3] For every key factual finding it made, the Board provided a credible basis on the evidence. Because the Staff cannot successfully refute the thought and deliberation of the tribunal in its determination of what Mr. Geisen knew and when he knew it, the Staff chooses to turn its Petition into a screed against the Decision based solely on the fact that it is inconsistent with the Staff's entrenched institutional view. The essence of the Staff's brief is the mantra it repeats in the hope of getting *de novo* review: We do not agree with the Majority's findings; therefore, they are "clearly erroneous."

Because it cannot credibly overturn the Board's findings, the Staff decries the Board's thinking as a surprising and new psychological exercise that left the Staff at the mercy of an unprecedented standard in judicial decision-making. What the Staff fails to understand is the Board was simply performing traditional fact-finding functions: resolving conflicts or ambiguity in the testimony or in the tangible evidence, and determining the credibility of witnesses, based on considerations of bias, interest, motive to falsify one's testimony, reasonableness or probability of testimony, and witness demeanor. In addition, the Board considered the presence or absence of evidence, direct or circumstantial, that would contradict or corroborate the facts the parties adduced.[4] There might be disagreement over factual determinations that were made; after all,

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[3] *See Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 190 (2004) ("*TVA*").

[4] It is not enough to point to an isolated sentence or a page, for that matter, and argue that evidence was ignored or that it proves a "clearly erroneous" factual determination. What is missing in that equation, something easy to do when dealing not with scientific data but, rather, with human events, is the role of weighing the evidence and deciding where the truth lies.

reasonable people can differ. But there is nothing in the findings that is beyond all reason – therefore, nothing that is "clearly erroneous."

As for the issue of collateral estoppel, the Board was presented with the Staff's unequivocal and consistent assertion that deliberate ignorance did not meet 10 C.F.R. 50.5(a)(2)'s deliberate misconduct standard.[5] Based on this assertion, The Board examined the record from Mr. Geisen's criminal case and found it could not determine whether the jury convicted him of making false statements based on his actual knowledge of their falsity or on his deliberate ignorance of the truth; so it could not determine whether a finding of actual knowledge was essential to Mr. Geisen's conviction. Consequently, the Board used its discretion and declined to apply collateral estoppel to this case.[6] Given the Staff's dual pronouncement that deliberate ignorance would not be enough under NRC regulations to prove a knowing violation and that it intended to prove in the hearing Mr. Geisen's actual knowledge, the Board's discretion was hardly taxed when it declined to apply collateral estoppel here.[7]

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[5] There is no question this was posited to the Board. The Staff went on to say the case it would prove was one of actual guilty knowledge, nothing less.

[6] Though it did not form the basis of the Board's Decision on this issue, the Board considered and agreed with Mr. Geisen's argument that deliberate ignorance and actual knowledge are inconsistent standards which – when given similar weight in instructions – could lead a jury to conclude that instead of having actual knowledge of what he was saying was wrong, a defendant can be found guilty because he should have known what he said was wrong.

[7] The Dissent argues for the application of collateral estoppel. It pointedly asserts the Staff made a mistake in essentially charting a course of proof of actual knowledge and nothing else. Dissent at 17 n.10. The nature of this argument reflects the Dissent's understanding that collateral estoppel based on deliberate ignorance cannot be applied under the Staff's formulation of 10 C.F.R. 50.5(a)(2)'s deliberate misconduct standard. Indeed, deliberate ignorance does not meet the NRC's deliberate misconduct standard. *See* n.33 *infra*.

DISCUSSION

I. THE BOARD'S FINDINGS WERE NOT CLEARLY ERRONEOUS

A. Standard of Review for Board Factual Findings

The Commission defers to its licensing boards' fact findings, so long as they are not "clearly erroneous."[8] "A 'clearly erroneous' finding is one that is not even 'plausible in light of the record viewed in its entirety.'"[9] "'[A]lthough the Commission has the authority to reject or modify a licensing board's factual finding, it will not do so lightly.'"[10] Under this standard of review, the Commission "'will not overturn [a] hearing judge's findings simply because [it] might have reached a different result.'"[11] The deference paid by the Commission to Board findings "is particularly great where 'the Board bases its findings of fact in significant part on the credibility of the witnesses.'"[12]

This entire case essentially comes down to a factual determination: whether David Geisen knew, at the time he provided it, that the information he provided to the NRC was false and misleading. The Board answered that question in the negative.[13] Given existing precedent, the Staff has a heavy burden: it must show that the Board's Decision was clearly erroneous, or "beyond

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[8] TVA, CLI-04-24, 60 NRC at 189.

[9] *Id.* (citing Kenneth G. Pierce (Shorewood, Il), CLI-95-6, 41 NRC 381, 382 (1995), quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)).

[10] TVA, CLI-04-24, 60 NRC at 189 (citing *Louisiana Energy Serv.* (Claiborne Enrichment Ctr.), CLI-98-03, 47 NRC 77, 93 (1998)).

[11] *Id.* (citing *General Pub. Util. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit *1)*, ALAB-881, 26 NRC 465, 473 (1987)).

[12] TVA, CLI-04-24, 60 NRC at 189 (*citing Private Fuel Storage, LLC (ISFSI)*, LBP-97-732-02, 58 N.R.C. 11 (2003)).

[13] Decision at 22.

all reason."[14] The Staff has not made any showing that the Decision is contrary to established law or procedure, or that it raises any substantial questions of law, policy or discretion. To be sure, it cannot show that it suffered any actual prejudice as a result of any purported procedural error.

B. The Staff has no Basis for its Contention that the Board Used a "Five Factor Test" to Decide this Case

Although it recognized that the Board's Decision was based on the preponderance of the evidence standard, the Staff alleges that the Board "actually required the Staff to meet a standard far higher than 'more likely than not,'" by subjecting its case to a "Five Factor Test." Petition at 4. This is incorrect. The so-called "Five Factor Test" appears nowhere in the Decision. The "Five Factor Test" is an artifice constructed by the Staff to evoke *de novo* scrutiny of the Initial Decision on the grounds that it was procedural legal error. None of the citations the Staff posits as composing this "test" has anything to do with establishing a legal standard. They are not even "factors." They are fairly unremarkable findings of fact based on the evidence, and many of these findings are undisputed.

For example, regarding the references to Mr. Geisen's expertise, the Board did not require the Staff to prove that Mr. Geisen was an expert. It simply found, based on the evidence, that though he may have appeared to the Staff to be an expert on the condition of the head, he was not.[15] Accordingly, when acting as company spokesman, he relied on information provided to him by others more knowledgeable than he.[16] Based on these findings, the Board determined that when

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[14] *See* n.9 *supra*.

[15] *See* Decision at 133.

[16] *Id.* at 25-26.

Mr. Geisen provided inaccurate information to the NRC, he did so believing the information to be true.[17]

The references to Mr. Geisen's workload and his responsibilities as Manager of Design Basis Engineering all relate to the following findings of fact. Mr. Geisen was never involved with or participated in head cleanings or inspections.[18] Mr. Geisen's duties were such that he had no involvement whatsoever in the drafting of Serial Letter 2731 and thus had no knowledge of the inaccuracies in the response prior to signing the Greensheet.[19] Because he was involved in his duties regarding the INPO evaluation, he likely did not read the "Gibbs Report" on the date the Staff speculates he read it.[20] After evaluating the evidence regarding Mr. Geisen's workload and responsibilities, he likely had no "'interactions' with the NRC until the teleconference on October 3, 2001, [nor] was [he] 'preparing' for them at any point until the alarm that was sounded on September 28, 2001." Decision at 75. Finally, because the contents of the memoranda and trip reports Mr. Geisen received from Prasoon Goyal did not relate to Mr. Geisen's duties as Manager of Design Basis Engineering, he never followed up or spoke with Mr. Goyal regarding these submissions, and he thus was not aware of the inaccuracies in Serial Letter 2731. *Id.* at 69-70.

The references to the "knowledge hierarchy" and to the importance of context in evaluating knowledge are somewhat different.[21] They are a way to explain the unremarkable proposition that what is remembered about information to which one is exposed depends on the context in which

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[17] *Id.* at 86-87, 93.

[18] *Id.* at 23, 60.

[19] *Id.* at 22-23. Indeed, Mr. Geisen was not copied on the communication that would have informed him of the inaccuracies of 2731. *Id.* at 57, 87.

[20] *Id.* at 93-96.

[21] In the first instance, the term "knowledge hierarchy" actually exists in the Board's opinion. *Id.* at 85 n.38.

that information is received. In short, the Board simply evaluated the totality of the evidence without prejudging the result, and it made reasoned, well-thought-out findings of fact based on that evaluation.[22]

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

The Staff asserts that "[t]he Majority explicitly stated that it afforded more weight to the absence of certain pieces of direct evidence than to the totality of circumstantial evidence." Petition at 9. This is not true. The Board recognized that "circumstantial evidence can be compelling," Decision at 132, but it was not enough to overcome "the demeanor and substance of [Mr. Geisen's] testimony [which showed] that he provided fully credible and believable explanations for why [he] believed what he did, and why his submissions to the NRC comported with those beliefs," *Id.* at 133 n.169.[23] What the Board did is not unusual. In making fact findings, adjudicative bodies often make decisions based on the presence or lack of evidence.[24] When it talks about its "overwhelming

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[22] If anything, this "Five Factor Test" discussion is more indicative of the Staff's erroneous judgments than of any error the Board might have made. Throughout this proceeding, the Staff has approached the evidence in this case through hindsight based on its initial conclusion that Mr. Geisen was guilty. It then filtered all the evidence through that prism, and it discounted as improper or illegitimate any conclusion that did not match its theory of the case. The Board understood this when it made the following observation regarding the Board Chairman's "impatience . . .with what was perceived as Staff counsel's inordinate focus on what Staff officials were thinking at critical times, rather than on Mr. Geisen's state of mind (*see, e.g. Tr.* at 1037-38, 1043, 1222) . . .[T]he problem was not lack of focus but lack of evidence." Decision at 133 n.169.

[23] As the Board put it,

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

Id. at 28.

[24] *See Bishop v. United States*, 107 F.2d 297, 303 (D.C. 1939), discussing in the criminal context the probative value of the absence of evidence and its impact on the burden of proof ("Reasonable doubt is a doubt arising from the evidence, or from a lack of evidence, after consideration of all the evidence."). *Accord, United States v. Hoffman*; 964 F.2d 21, 25 (D.C. Cir. 1992); *United States v. Poindexter*, 942 F.2d 354, 360 (6th Cir. 1991); *United States v. Thompson*, 37 F.3d 450, 453 (9th Cir. 1994).

circumstantial evidence," the Staff confuses volume with weight, and quantity with probity. All evidence may be equal, but it is not all equally probative.[25] In short, it is the Board's role to make credibility determinations. It did so, and that decision is entitled to deference.[26]

D. The Board's Reliance on the Office of Inspector General Report was Appropriate

The essence of the Staff's complaint is that – when finding Mr. Geisen did not gain actual knowledge of the condition of the RPV head from his viewing of the "Red Photo" during his time in Outage Central – the Board improperly relied on the Office of Inspector General Semi-Annual Report to Congress (the "OIG Report"). The Staff claims it was not put on notice that "evidence admitted during the penalty phase ... would be relied upon in adjudicating Mr. Geisen's liability." Petition at 11. The Staff's position is disingenuous and unfair. The OIG Report is an NRC public document. The Staff was aware of its existence and contents. Also, the Staff mischaracterizes what the Board said:

> [o]ur decision on Mr. Geisen's liability is based on the evidence we heard from Monday through Thursday. Nothing here goes to whether we think -- in other words, what Mr. O'Brien thought about liability is not important to us in deciding whether Mr. Geisen is liable, but liability and sanction are bound up together, and that's what Mr. Hibey is cross-examining on.

Tr. at 2157-2158 (emphasis added).[27]

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[25] *See Decision* at 63 n.112 ("For our part, we have indeed cumulated the impact of the individual pieces of evidence. But, as is true in mathematics as well, the cumulation of individual pieces of evidence that each establish nothing about the critical issue yields nothing upon which to support the Enforcement Order.").

[26] *See Tennessee Valley Authority* ("TVA"), CLI-04-24, 60 NRC at 189 (stating that "We ordinarily defer to our licensing boards' fact findings, so long as they are not 'clearly erroneous' . . . '[o]ur deference is particularly great where " the Board bases its findings of fact in significant part on the credibility of the witnesses.'") (internal citations omitted).

[27] Further in the colloquy, the court said "but Mr. O'Brien is here to defend the sanction, and the process he went through to get to that sanction involves the process he went through to find liability. The evidence in

(footnote continued on next page)

The Board relied on the OIG Report's finding that "the Davis-Besse Resident Inspector also reviewed the condition reports and saw the "Red Photo" during the 2000 refueling outage, yet did not recognize the significance of the boric acid corrosion." Decision at 64. It is true that Mr. O'Brien was asked about the OIG Report, but it is also true that the Board relied on the OIG Report's finding, *id.*, not on what Mr. O'Brien thought about it. *See* Tr. at 2208. Thus, the Board's consideration of the OIG Report was perfectly reasonable. Moreover, it was fair. The Staff should not be permitted to rely on the "Red Photo" if Mr. Geisen is to be prevented from putting it into context, particularly given the existence of this public report.

E. The Board's Finding on Factor 7 of the Sanction Determination Process is Irrelevant Given that the Board Set Aside the Enforcement Order

The findings to which the Staff objects are located in a section of the Board's opinion called "Sanctions if Order Had Been Sustained." Decision at 120. The order was set aside, and this analysis is unrelated to the issue of liability. The Board explained that it only addressed this issue to preempt any attempt by the Staff to use Factor 7 to prevent Mr. Geisen from returning to the nuclear industry. *Id.* at 122. Consequently, a discussion of the relative merits of statements similar to those made by Mr. Geisen during the penalty phase of the hearing is unnecessary, given the current posture of this case.

F. The Staff's Four "Central Findings" Misrepresent the Board's Decision

The Staff identifies what it says are four "central findings" of the Board as to Mr. Geisen's state of mind and claims they are clearly erroneous. Petition at 18. The Staff submits no citations to the hearing record or to the Initial Decision to support its strange formulations. These "central

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(footnote continued from previous page)
front of him that led to the sanction is the same evidence that led -- is some of the same evidence that led to liability." Tr. at 2159.

findings" which the Staff describes as "rationalizations," as distinguished from facts, are nothing more than the Staff's venting of its disagreement with the Board's decision. The Staff's examples of these "findings" will be discussed below. Each demonstrates why the Board's findings of fact and credibility determinations should be given the deference to which they are entitled.

1. Bulletin Requirements and Inspection Limitations

The Staff offers the following snippet of Mr. Geisen's testimony attempting to show that he knew "it was not possible to view the entire head using the camera-on-a-stick through the existing weep holes." Petition at 20 (citing Tr. 1557, 1958-59).

> Question: So going back again, the modification – you knew the modification had been in place since 1994. Correct?
>
> Mr. Geisen: Correct
>
> Question: To cut access holes. And you knew the access holes were being requested in that modification because they couldn't get to the entire head using a camera on a stick through a weep hole. Isn't that correct?
>
> Mr. Geisen: Correct.

Petition at 19 (citing Tr. 1958-59). The Staff takes this passage out of context by not including the testimony immediately preceding and following it. The preceding testimony is as follows:

> Q: And I am asking whether that modification, which has been in place since 1994, was there because you couldn't access the entire head through the weep holes.
>
> Q. And you knew that, didn't you?
>
> JUDGE FARRAR: I thought he answered --
>
> THE WITNESS (Mr. Geisen): No.

Tr. at 1958. The omitted testimony following the Staff's citation is as follows:

> Q. So you knew that it was not possible to see 100 percent of the head in 1996. Isn't that correct?
>
> A. I would say that's correct the way that's worded.

Tr. at 1959 (emphasis added). The Board relied not just on this testimony but also on "Mr. Geisen's repetitive and uncontroverted testimony . . .that he was unaware that the camera-on-a-stick technique did not just present difficulties but actually was inadequate to provide a view of all the nozzles." Decision at 81 (citing *id.* at 78-80). For example, the Board credited Mr. Geisen's testimony regarding the 2000 inspection as proof he did not know about the limitations of the camera-on-a-stick technique as performed during that inspection:

> A: . . .[f]or instance, in the 2000, I don't know that we even used a stick.
>
> Q: You don't know that?
>
> A: I don't know, because it appeared as though – what I've looked at since then, it looks as though like the camera angle was moveable, which would lead me to believe that perhaps there was (sic) boroscope-type camera used instead.

Tr. at 1935. The Staff discounts this testimony, arguing without support that the Board "skew[ed]" it. Petition at 19. The Staff's response is not to provide additional evidence but to cite again to the passage from Tr. 1958-59 it cited above. *Id.* at 20. Thus the record shows that the full context of Mr. Geisen's testimony supports the Board's conclusion "that he was unaware that the camera-on-a-stick technique did not just present difficulties but actually was inadequate to provide a view of all the nozzles." Decision at 81.

On page 20-21 of its brief, the Staff claims that because Mr. Geisen's knew the Bulletin addressed past inspections, he could not be telling the truth when he testified that his "general view was that the information requested by the Bulletin, including possible limitations on inspection of the reactor vessel head, was forward looking." Decision at 85 (citing Tr. at 1826-27) (emphasis in original). The Staff cites testimony in which Mr. Geisen is shown paragraphs from the Bulletin and he confirms what it says. *See* Tr. at 1820. But Mr. Geisen testifies that his understanding of the Bulletin requirements was different when the responses were drafted. *See* Tr. 1822:18 ("[h]indsight

being 20/20, I wish I had also viewed the existence of any kind of debris as an impediment as well, but that is not how I viewed it at the time."). Mr. Geisen's testimony is consistent on this point:

> Q. So wouldn't it make sense that the discussion we were reading before refers to past inspections.
>
> A. No, that's not how I took it at all.

Tr. at 1826:20. The Board believed Mr. Geisen. Decision at 85.

In an attempt to counteract Mr. Geisen's credible testimony, the Staff indulges in an unbecoming "gotcha" exercise with excerpts from Mr. Geisen's testimony at his criminal trial that left out the most relevant testimony regarding his state of mind that clearly validates the Board's factual finding:

> Q. When bulletin -- I'm sorry, when the response, 2731, was sent to the NRC, it said the visual inspections would not be compromised, didn't it?
>
> A. That's correct.
>
> Q. And you thought that was okay because you could always come back with another kind of inspection?
>
> A. That's correct.

Staff Ex. 71 at 1986:2-8; Petition at 21. The next question – omitted by the Staff – is:

> Q. Is that accurate and complete if it doesn't contain the information that you already knew?
>
> A. BASED ON WHAT I KNOW TODAY, NO, I'D HAVE TO SAY NO.

Staff Ex. 71 at 1986:9-13 (emphasis added).

2. Staff Arguments Regarding Videotapes and the "Greensheet"

The Staff's arguments against the Board's findings regarding how Mr. Geisen viewed inspection videotapes and his signing of the Greensheet are no more availing in its Petition than they were in

its Application for a Stay. Therefore, Mr. Geisen relies on his brief in Opposition to the Staff's Application for a Stay and respectfully refers to the Commission to the arguments set forth therein.

3. The Staff Misstates the Record Regarding the TA Briefing

The Staff's arguments regarding the October 11, 2001 TA briefing again reflect mischaracterizations of the record in an attempt to discredit fact-finding with which it disagrees. Everything the Staff offers in support of its position is only part of the evidence, ignoring the remainder that gives context to the Board's findings. For example, the Staff asserts "the Majority found that Mr. Geisen did not provide the NRC inaccurate and incomplete information in the TA briefing because the information was not 'contradictory to the general understanding [Mr. Geisen] had then of the facts at hand.'" Petition at 24 (citing Decision at 104) (emphasis added). The Board actually found:

> that the FENOC managers worked as a team the night before [the TA meeting] to prepare the presentation, and therefore, without any evidence that Mr. Geisen was informed of any inaccuracies in any of the information stated in the two slides in question, we are unable to find that [the] information is contradictory to the general understanding he had then of the facts at hand.

Decision at 104 (emphasis added). Thus, the Board never found that "Mr. Geisen did not provide the NRC with inaccurate and incomplete information. . . ." Petition at 24. That the basic information Mr. Geisen conveyed to the TAs was inaccurate and incomplete is uncontroverted. What the Board determined was that, on October 11, 2001, Mr. Geisen did not know the information was inaccurate and incomplete.

Likewise, the Staff asserts Mr. Geisen testified that he used only Serial Letter 2731 as the basis for the slides, and because 2731 did not support the information in the slides, Mr. Geisen "admitted" he had no basis for the statements therein. *Id.* at 25. However, this "admission" comes

at the end of a 14-line statement by Judge Trikouros, Tr. at 1944:2-16, to which Mr. Geisen responds "[c]orrect." Tr. at 1944:17. When discussing only this issue, Mr. Geisen testified that

> . . . information . . . in those slides was a culmination of what we knew, or what I knew from 2731, and the team effort to put together a slide of what the team believed created the correct picture . . . . It's not like it's a -- just blindly taking it from 2731. [28]

Tr. at 1926: 12-19.

The Board's conclusions about Mr. Geisen's role in the TA meeting are supported by the record. It found Mr. Geisen prepared for the meeting with a team of Davis-Besse personnel and an employee of Framatome, a company that had actually participated in head inspections at the facility. Decision at 104; Tr. at 1725. Because no one on the team asserted that the information in the slides was inaccurate, Mr. Geisen continued to believe the presentation materials were consistent with an intent to create a "correct picture" of the Davis Besse situation. Tr. 1926; Decision 104.

The Board's belief in Mr. Geisen's credibility is further supported by the evidence that when Mr. Geisen found out he had provided inaccurate information to the NRC he brought it promptly to the attention of his management.[29]

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[28] The staff cites to Tr. at 1944, Petition at p.25 n 58, that "Mr. Geisen agreed he was "creating information." Yet in a colloquy at Tr. at 1977:16 - 1980:7, Mr. Geisen identified further the basis for the slides he presented: a) he understood the 1998 and 2000 inspection recordings reflected good inspections (Tr. at 1979); b) 2731 suggested that 1998 inspection had not revealed any "precluded nozzles" (Tr. at 1980) .

The idea of "creating information" to please Mr. Campbell (Tr. at 1934-44) was pointedly addressed and Mr. Geisen rejected the suggestion entirely (Tr. at 1983-85).

[29] Decision at 26, 104. *See also* Staff Ex. 74, 1293-94 (Criminal Trial Testimony of Steven Moffitt).

II. THE BOARD'S DECISION REGARDING COLLATERAL ESTOPPEL WAS APPROPRIATE AND IN COMPLIANCE WITH ESTABLISHED LAW

A. Collateral Estoppel Generally

Collateral Estoppel is a common law doctrine under which "a prior judgment operates as an absolute bar to relitigation of the issues estopped."[30] To apply collateral estoppel, the party seeking to prevent relitigation must prove the following:[31]

> (1) that the issue at stake [is] identical to the one involved in [the] prior litigation; (2) that the issue has been actually litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in [the] earlier action.

Hicks v. Quaker Oats Co., 662 F.2d 1158, 1166 (5th Cir. 1981).

B. The Board Correctly Decided the Collateral Estoppel Issue

Early in the pre-hearing phase of this case, the Board recognized that four issues complicated the collateral estoppel analysis. Decision at 34. Two of those issues are important for the discussion here: "the difference between the substantive standards of guilt that govern here (under the terms of [NRC] regulations), and the more expansive standards that were applied in the criminal case (under the trial judge's instructions to the jury)" and "the jury's routine rendering of a general verdict in the criminal case." *Id.*[32]

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[30] *S. Pac. Commc'ns Co. v. AT&T*, 740 F.2d 1011, 1020 (D.C. Cir. 1984).

[31] *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992) ("[t]he party seeking to preclude relitigation of an issue has the burden of showing that the same issue was 'actually and necessarily determined' in a prior litigation.") (*citing Ottley v. Sheepshead Nursing Home*, 784 F.2d 62, 65 (2d Cir. 1986)).

[32] The other two issues were: "the fact that only one of the counts of the criminal indictment that had resulted in guilty verdicts had a counterpart charge in the Enforcement Order" and "the pendency of an appeal of the criminal conviction." Decision at 34.

The Board noted that the jury in Mr. Geisen's criminal trial was instructed that it could convict Mr. Geisen on a theory of actual knowledge, or on a theory of deliberate ignorance.[33] The Board also recognized that the Staff repeatedly acknowledged willful or deliberate ignorance would not rise to the standard of knowingly providing incomplete or inaccurate information under 10 C.F.R. 50.5(a)(2).[34] The Board further observed that the Staff "never wavered" from this position, Decision at 41, to the point that it had effectively "disavowed" the argument that a conviction on the basis of deliberate ignorance could support an application of collateral estoppel in this case. *Id.* at 42.[35] Accordingly, the Staff based its case solely on actual knowledge. Tr. at 2397; Decision at 42 n.77. Both parties and the Board, but, apparently, not the Dissent, relied on the Staff's position in the presentation of evidence and in the Board's questioning. *Id.* at 44. Once this position became, in effect, the law of the case, the Board understood that the jury's general verdict did not "allow[] [the Board] to isolate the influence of the expanded standard in the jury instructions." *Id.* at 34 (citing Tr. at 691).

The Board evaluated the collateral estoppel arguments within the above framework, and it decided "[f]or [its] purposes, the first of [the elements of collateral estoppel] is the crucial one: collateral estoppel applies only if an issue determined in the criminal proceeding is identical to one in front of us." Decision at 36. The Board observed that "[t]he complexity of the issues and facts underlying both the Staff's Enforcement Order and the jury verdict in the criminal case raises at

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[33] *Id.* at 40 n.69 (citing Transcript of Record, *U.S. v. Geisen*, DOCKET NO. 3:06-CR-712 at 2239-39 [hereinafter Crim. Tr.]).

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

[35] *See also id.* at n.76 (noting that "the Staff disavowed [application of collateral estoppel based on deliberate ignorance] throughout, including at the very end.").

least a question as to whether the issues essential to the prior judgment are the same as those before us." *Id.* at 40.[36] The Board found that the law regarding "knowledge" applied in the criminal case was not the same as the law we are to apply here, and it determined that the issue was "not even close." *Id.*[37] As a result, the Board "inexorably" came to the conclusion that collateral estoppel could not be applied in this case. *Id.* at 41.[38] Both the Staff and the Dissent take issue with the Board's conclusions regarding application of collateral estoppel, but for different reasons. Neither analysis should prevail.

C. The Staff's Collateral Estoppel Analysis is Flawed

The Staff begins its argument by completely misunderstanding the Board's analysis. The Board never "substituted its determination of fact for that of the jury," Petition at 13, and although it

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[36] The Board takes considerable pains to explain the background, context and reasoning behind its collateral estoppel reasoning. *See* Decision at 33-39. A part of this background includes a discussion about whether administrative tribunals have the discretion to refrain from applying collateral estoppel in certain circumstances. *Id.* at 36 n.59 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)). The Board explains that *Parklane* discretion is something it would apply "[e]ven where all of the factors [elements of collateral estoppel] are met. *Id. Accord, Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 563-64 n.7 (1977) (discussing the "public policy" analysis to be applied to the exercise of discretion when the elements of collateral estoppel are present). In this case, however, it is not necessary to engage in this analysis because, as the Board explains, the elements of collateral estoppel are not present. *Id.* at 35-40. To the extent the Staff engages in this analysis anyway, *see* Petition at 11-13; Mr. Geisen disagrees with the Staff's reasoning and incorporates by reference his arguments in Opposition to the Staff's Collateral Estoppel Motion, specifically the arguments on page 2 of that Opposition.

[37] The Board's reasoning is entirely consistent with established law. *See Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971) ("[i]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits [is] the same."). *See also Overseas Motors, Inc. v. Import Motors Ltd.* 375 F. Supp. 499, 518 n.66a (E.D. Mich. 1974) ("different legal standards as applied to the same set of facts create different issues.").

[38] The pending appeal in the criminal case, Decision at 37-40, and the possibility of an inconsistent jury verdict related to identical language contained in Serial Letter 2744 (for which Mr. Geisen was convicted) and Serial Letter 2745 (for which Mr. Geisen was acquitted), *id.* at 51-53, also informed the Board's decision regarding collateral estoppel. Mr. Geisen agrees with the Board's analysis on these points. Regarding the inconsistent verdict issues, Mr. Geisen incorporates by reference the arguments he made in his Opposition to the Staff's Collateral Estoppel Motion at 3-4. To the extent the Petition for Review and the Dissent address these issues, they will be addressed *infra*.

made comments regarding the sufficiency of the evidence adduced in this proceeding, it never claimed to know anything about the basis for the jury's verdict. In fact, it specifically stated that "without a special verdict to guide us, we would not deign to interpret the jury's thinking." Decision at 49. The Staff accuses the Board of relying on an improper assumption regarding the jury's process, but the Board's decision is rooted in its determination that it could not make any assumptions about what the jury decided.[39] As the Board clearly and succinctly explained, "the fact that the original judgment is subject to alternative interpretations provides reason to exercise our discretion not to apply collateral estoppel." *Id.* at 50. The Commission should not base its decision in this matter on the Staff's misreading of the Decision. Likewise, it should not place much stock in its misreading of the law.

The Staff cites *Otherson v. Department of Justice, Immigration and Naturalization Service*, 711 F.2d 267, 274 (D.C. Cir. 1983) (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)) for the proposition that the Board should have applied collateral estoppel based on whether the jury "could have accepted" a finding of actual knowledge. Petition at 14. *Otherson* actually stands for an opposing proposition: collateral estoppel cannot be applied if "'a rational [factfinder] could have grounded its verdict upon an issue other than that which the [party] seeks to foreclose from consideration.'" *Otherson*, 711 F.2d at 274 (alterations in original) (internal citations omitted).[40] Thus, when the Board suggests "a legitimate concern" about a tainted verdict is sufficient to cause it to refrain from applying collateral estoppel, it is not announcing a "new, lenient discretionary standard," Petition at 14, it is merely following established law.

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[39] *See* Decision at 49 ("the Board has insufficient guidance available from which to determine whether the jury conviction was premised on Mr. Geisen having had actual knowledge, or on Mr. Geisen having been deliberately ignorant.").

[40] *See also id.* at 50 n.96 (citing *Otherson*).

The only argument the Staff makes that bears relationship to the established law and what the Board actually decided is that it is "clear from a reading of the criminal record that a reasonable and rational jury would have found that the evidence demonstrated Mr. Geisen knowingly, with actual, positive knowledge, made material false statements to the NRC in Serial Letter 2744." *Id.* The basis for this "clarity" is the Board's statement, in response to an argument from the Dissent, that "there is no evidence presented [in the NRC proceeding] that fits the 'willful blindness/deliberate disregard' fact pattern," Decision at 45 (emphasis omitted), and the Sixth Circuit's holding in *United States v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995). *Id.*; Petition at 14 n.39. The Staff argues these authorities mean if the jury could have decided the criminal case based on deliberate ignorance or on actual knowledge and there is insufficient evidence of deliberate ignorance, then, for collateral estoppel purposes, one must conclude that the jury decided the case based on actual knowledge. Petition at 14. The Staff's reliance on the Board statement is misplaced, its reliance on *Mari*, troublesome.

The Staff characterizes the Board's statement as an admission that "presumably" no evidence of deliberate ignorance was presented to the jury. *See id.* Such a characterization is unsupported by the record. The statement was made in the context of the Board's response to the Dissent on the "risk of confusion" created by the deliberate ignorance instruction, and it should not be read as making any statements regarding the evidence adduced at the criminal trial. *See* Decision at 45. In fact, the next clause the Board writes after the statement is "[w]e cannot speak to the precise nature of the evidence that was before the district court jury." *Id.* Even if one discounts the aforementioned clause, the Board made several other statements indicating it could or would not

presume to make assumptions about issues related to the jury and what it concluded.[41] Thus, it is difficult to conclude, on the basis of the record, that the Board's statement can be relied upon to establish anything about the quality of the evidence reviewed by the jury.

The Staff relies on the Sixth Circuit decision in *Mari* to bolster its claim that the jury in the criminal case decided the case based on actual knowledge. Petition at 14 n.39.

> In *Mari*, [the Sixth Circuit] held that when a district court gives a deliberate ignorance instruction that does not misstate the law but is unsupported by sufficient evidence, it is at most harmless error, so long as there is sufficient evidence of the defendant's actual knowledge to support a conviction.

United States v. Ross, 502 F.3d 521, 528 (6th Cir. 2007) (emphasis added). First, it is unclear whether *Mari's* harmless error analysis is still viable, given recent decisions – including at least one from the Sixth Circuit – that challenge *Mari's* holding regarding the deliberate ignorance instruction.[42] Even if the *Mari* analysis is good law, to apply it here, the Staff would have to establish that no evidence of deliberate ignorance was presented to the jury, and it would have to show sufficient evidence that the jury in the criminal case actually decided the case based on actual knowledge. *Id.*

To bolster the claim that no evidence of deliberate ignorance was presented to the jury, the Staff relies on a statement the Board likely did not make and on Mr. Geisen's claims in arguments challenging the deliberate ignorance instruction or the sufficiency of his conviction. *See* Petition at 14 n.38. The utility of Mr. Geisen's statements in this context is unclear because they address issues that are "a matter for the Sixth Circuit on direct appeal." Decision at 46. In any event, even if they have some utility here, they simply facilitate the onset of a more problematic analysis.

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[41] *See generally* Decision at 49. *See also id.* at 46, 47 n.88, 49 n.95.

[42] *See* Decision at 46 n.85 (citing cases).

The Staff must prove the jury convicted Mr. Geisen based on actual knowledge. In a complex false statements case such as this one, working back through the evidence to establish knowledge after the fact is a difficult undertaking. As the Board noted:

> In a less complex case, it might be a matter of only minor difficulty to ferret out that, in light of the evidence presented, a jury verdict could be clearly read as embracing one, but not another, of the prosecution's theories. But this is not a simple case, and the threads of evidence that make up the story of the nature of Mr. Geisen's involvement and knowledge are difficult to follow.

Decision at 49. Engaging in this process to support the application of collateral estoppel is problematic:

> to determine that the jury's verdict was based on Mr. Geisen knowingly providing materially inaccurate and incomplete information to the NRC in Serial Letter 2744 (Count 4) would require . . .a thorough examination of the evidence underlying the Government's case in the criminal trial. But performing such a duplicative examination is precisely what application of collateral estoppel is intended to prevent. If we must re-examine the issue one way or another, it makes more sense to do it on the evidence presented to us than on the evidence presented elsewhere.

Id. at 50. In short, to apply *Mari's* harmless error analysis in the collateral estoppel context is to begin a process that undermines the doctrine's rationale. Consequently, the *Mari* case is of little use here. Even if that were not the case, the Staff still cannot show that the jury decided the criminal case based on actual knowledge. In support of this contention, the Staff leans heavily on the fact analysis from its Collateral Estoppel Motion. Petition at 14 n.37 (citing the Staff Motion for Collateral Estoppel at 5-25). Those pages simply repeat the factual analysis the Board has already rejected:

> There are other reasons to reject the Staff's position that we should be able to determine, or at least intuit, that there was ample evidence for the jury to have found Mr. Geisen guilty on the deliberate misconduct standard. In the first place, as appears from our discussion of the merits below, we do not believe that the evidence before us shows that the Government (here, the NRC Staff) met that

> substantive standard as to Serial Letter 2744, even under the relaxed procedural standard of "preponderance of the evidence."

Decision at 50-51. In short, regarding the main element on which the Board decided the collateral estoppel issue,[43] the Staff has not been able to undermine the Board's central finding which is that collateral estoppel cannot be applied because "the law regarding 'knowledge' applied in the criminal case was not the same as the law we are to apply here." *Id.* at 40.

The rest of the Staff's collateral estoppel arguments can be addressed in short order. The Staff argues that the way to uphold the purpose of collateral estoppel is to "apply collateral estoppel, determine the appropriate sanction, and should Mr. Geisen's conviction be overturned on appeal, reinstate the Initial Decision." Petition at 13. This position makes no sense and is contrary to established law. Collateral estoppel serves three main purposes which are to "protect[] litigants from the burden of relitigating an issue which the other party has already litigated and lost;" to "promote[] judicial economy by preventing needless litigation;" and to "'foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions.'"[44] As the Staff itself recognizes, relitigating the case mooted concerns of judicial economy. *See* Petition at 13, 16.[45] Regarding finality and reliance on judicial decisions, following the Staff's recommendation does not facilitate finality, it delays it.[46] The Staff's argument that collateral estoppel must be applied to prevent disrespect for the district court is misplaced. The district court handed down its sentence

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[43] *See* Decision at 20.

[44] *S. Pac. Commc'ns Co.*, 740 F.2d at 1019 (citing *Montana v. United States*, 440 U.S. 147, 154 (1979)).

[45] *See also Harvey v. United Transp. Union*, 878 F.2d 1235, 1243 (10th Cir. 1989) ("[A]llowing issue preclusion claims to be raised post-trial does nothing to vindicate two primary policies behind the doctrine, conserving judicial resources and protecting parties from 'the expense and vexation' of relitigating issues that another party previously has litigated and lost.") (citing *Montana*, 440 U.S. at 153-54).

[46] In any event, finality on the criminal conviction is up to the Sixth Circuit, not the NRC.

fully aware that the Board might decide the way it did.[47] In any event, the two proceedings were qualitatively different. The Board had more knowledge of the technical and professional context in which the issues in this case evolved, and it had much more time with the evidence than did the jury. *See* Decision at 49. Thus, it is not surprising the Board reached a different conclusion than did the criminal jury. Because the two proceedings are so different, any inconsistency in their outcomes is understandable.

D. The Dissent's Analysis is Misplaced and its Position Unsupported

The Dissent makes two arguments regarding the central finding in the Board's collateral estoppel analysis. It asserts a conviction on the theory of deliberate ignorance would satisfy the NRC's deliberate misconduct standard, and that collateral estoppel should be applied in this case despite the Staff's "erroneous" "waiver" of the argument because Mr. Geisen would not be prejudiced.[48] For the most part, the Board's Decision more than adequately deals with the merits of these arguments, and Mr. Geisen incorporates them here; *see generally* Decision at 40-51. A contextual point bears mentioning. First, as it relates to this proceeding, the collateral estoppel analysis depends on determining what the jury in the criminal case *actually* decided, and the relationship between that issue and the issue being litigated here. Collateral estoppel cannot be applied based on an analysis of what the jury could have decided, or what it might have decided.

The Staff recognizes the proper analysis but falls short because it cannot credibly show what the jury actually decided. The Dissent understands it cannot determine what the jury decided, and

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[47] Sent. Tr. at 30:4-16.

[48] *See* Dissent at 11 (deliberate ignorance is the same as knowledge); *id.* at 17 ("waiver" does not foreclose collateral estoppel). The Dissent also rejects the argument regarding inconsistent verdicts. *Id.* at 8. Regarding inconsistent verdicts, Mr. Geisen adopts and incorporates by reference the Board's treatment of this issue. *See* Decision at 51-53.

its solution to that problem is to argue another issue.[49] Its treatment of the deliberate ignorance instruction, *see* Dissent at 10-16, is not a collateral estoppel argument. It is an argument about the sufficiency of Mr. Geisen's criminal conviction, a matter that all agree is the province of the Sixth Circuit on appeal.[50] In the entire seven pages on which the Dissent discusses this issue, it mentions the relationship between the NRC standard and the deliberate ignorance once, and the statement it makes is unsupported. *Id.* at 16.

CONCLUSION

For the reasons set forth above, the Staff's Petition should be denied.

Respectfully Submitted,

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Dated: October 13, 2009

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[49] The Dissent's "waiver" argument flows from this erroneous analysis, as it had to find a way to reconcile with the fact that its position differed from that of the Staff. The Commission should refrain from applying collateral estoppel here for the reasons the Board discusses on pages 43-44 of the Decision.

[50] *See* Decision at 49 n.95 (addressing the difference between a sufficiency of conviction analysis and a collateral estoppel analysis).

CERTIFICATE OF SERVICE

I hereby certify that copies of David Geisen's Opposition to the NRC Staff Petition for Commission Review in the above-captioned matter have been served on this 13th day of October 2009, on the following persons via email as indicated by an (*) and by regular mail as indicated by an (**):

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