UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of DAVID GEISEN	Docket No. IA-05-052

CLI-10-23

MEMORANDUM AND ORDER

On January 4, 2006, the NRC Staff issued an Enforcement Order against David Geisen, charging that he had engaged in deliberate misconduct by contributing to the submission of information to the NRC that he knew was incomplete or inaccurate in some material respect,[1] in violation of 10 C.F.R. § 50.5(a)(2).[2] At the time of the asserted misconduct, Mr. Geisen was employed at the Davis-Besse Nuclear Power Station (Davis-Besse), a facility operated by

[1] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), IA-05-052 (Jan. 4, 2006) (ADAMS accession number ML053560094), 71 Fed. Reg. 2571 (Jan. 17, 2006) (Enforcement Order). The Order identified six instances where, according to the Staff, Mr. Geisen had deliberately provided such information: Serial Letters 2731 (Sept. 4, 2001), 2735 (Oct. 17, 2001) and 2744 (Oct. 30, 2001); an October 3, 2001 teleconference; an October 11, 2001 briefing to the Commissioners' technical assistants; and a November 9, 2001 meeting of the NRC's Advisory Committee on Reactor Safeguards.

[2] Section 50.5 provides, in relevant part, that "[a]ny . . . employee of a licensee . . . may not . . . [d]eliberately submit to the NRC [or] a licensee . . . information that [employee] *knows* to be incomplete or inaccurate in some respect material to the NRC." 10 C.F.R. § 50.5(a)(2) (emphasis added). The Staff further found that Mr. Geisen's actions had placed the licensee in violation of 10 C.F.R. § 50.9. Enforcement Order at 14.

FirstEnergy Nuclear Operating Company (FENOC). The Enforcement Order barred Mr. Geisen, effective immediately, from involvement in all NRC-licensed activities for five years. Mr. Geisen challenged the Enforcement Order before the Licensing Board. During the prehearing portion of this adjudication, Mr. Geisen and the Staff stipulated to the falsity of certain statements made by FENOC and Mr. Geisen. But Mr. Geisen maintained throughout the adjudication – and still maintains – that he did not know at the time he made those statements that they were false.

The Board conducted an evidentiary hearing, and a majority of the Board issued the Initial Decision that is before us today on appeal.[3] In that decision, the majority set aside the Enforcement Order on the ground that the Staff had not demonstrated by a preponderance of the evidence that Mr. Geisen had committed the asserted knowing misrepresentations. Based on the evidence presented, the majority also prohibited the Staff from using the portion of the Order barring Mr. Geisen from returning to employment in the regulated nuclear industry after his employment ban is lifted or expires.[4]

The Staff has filed a petition for review of LBP-09-24,[5] pursuant to 10 C.F.R. § 2.341(b)(2) and (4). The Staff asserts that the Initial Decision "contained legal conclusions that were contrary to or without established precedent; raised substantial questions of law, policy, and discretion; involved prejudicial procedural errors; and reflected findings of material fact that were clearly erroneous."[6] Based on these assertions, the Staff asks that we grant its

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[3] LBP-09-24, 70 NRC __ (Aug. 28, 2009) (slip op.). Administrative Judges Farrar and Trikouros formed the majority. Chief Administrative Judge Hawkens dissented from this ruling. Judge Farrar subsequently provided additional views. *See* Memorandum (Additional Views of Judge Farrar), 70 NRC __ (Dec. 11, 2009) (slip op.).

[4] *Id.* at __ (slip op. at 144). *See also id.* at __ (slip op. at 122).

[5] *See NRC Staff's Petition for Review of LBP-09-24* (Sept. 21, 2009) at 1 n.2 (Staff Petition).

[6] *Id.* at 2-3 (tracking the criteria set forth in 10 C.F.R. § 2.341(b)(4)(i)-(iv)).

petition, reverse LBP-09-24, and reinstate Mr. Geisen's five-year employment ban.[7] Mr. Geisen opposes the Staff's petition for review.[8] We grant the Staff's petition and affirm LBP-09-24.

To put this decision in context, the violations surrounding Davis-Besse resulted in a variety of agency activities, including actions taken against FENOC which resulted in its shutdown for several years and issuance of a $5.45 million fine, the largest fine to date in the agency's history. Moreover, both the NRC and the United States Department of Justice (DOJ) pursued actions against the company and several individuals, most of which resulted in penalties being upheld. This ruling is based upon the specific facts and circumstances of the Board's ruling in LBP-09-24 and should only be viewed in that context.

I. BACKGROUND

The majority decision provides a detailed and useful synopsis of the case's technical background and relevant technical documents.[9] It also includes a detailed summary of the factual and procedural background, together with an explanation of the interrelationship between this proceeding and the parallel criminal case against Mr. Geisen in federal court.[10] Given the Board's thorough discussion, we find it unnecessary to set out here more than a brief sketch of the factual, technical, and legal background of this case.

In 2001, the Commission issued various generic communications to its reactor licensees regarding a newly discovered risk of circumferential cracking of nozzles penetrating the reactor vessel head, including the control rod drive mechanism (CRDM) nozzles and thermocouple

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[7] *Id.* at 3.

[8] *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* (Oct. 13, 2009) (Geisen Answer).

[9] LBP-09-24, 70 NRC ___ (slip op. at 9-19).

[10] *Id.* at __ (slip op. at 4-8).

nozzles. One of these communications was Bulletin 2001-01,[11] where the NRC staff required every pressurized water reactor licensee (including FENOC) to "provide information related to the structural integrity of the reactor pressure vessel head penetration . . . nozzles for their respective facilities."[12] The Bulletin explained that reactor coolant leaking through the tight cracks in the nozzles could cause deposits of boron to accumulate on the reactor head.[13] The Bulletin was, by its nature, a vehicle to gather information, not an enforcement tool.[14]

During a five-week period between October 3 and November 9, 2001, FENOC was repeatedly in touch with the NRC regarding FENOC's responses to the Bulletin.[15] At the time of these communications, FENOC's management was concerned particularly that the Commission would shut down the Davis-Besse plant in December 2001, a few months prior to its scheduled March 2002 refueling outage (RFO 13).[16] After FENOC submitted information and

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[11] Staff Ex. 8, NRC Bulletin 2001-01: *Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles* (Aug. 3, 2001) (Bulletin) (Staff Exhibits – Volume 1, Exhibits 1-20 (Part 1) are available at ML093100167) (Staff Exhibits, Part 1, at 89).

[12] *Id.* at 1.

[13] *Id*. at 4-5.

[14] *See id.* at 1, 10-13; Notice of Issuance, Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles; Issue, 66 Fed. Reg. 41,631 (Aug. 8, 2001).

[15] *See* LBP-09-24, 70 NRC __ (slip op. at 17, Table 1) (listing the six communications referenced in note 1, *supra*).

[16] The Staff had "strongly suggest[ed] that Davis-Besse . . . consider shutting down by the end of the year [2001] and perform an inspection of the reactor head vessel CRD nozzles." Staff Ex. 46, E-mail from Dale L. Miller (FENOC) to George.Rombold@exeloncorp.com, *et al.* (Sept. 28, 2001) (Staff Exhibits – Volume 1, Exhibits 21-70 (Part 2) are available in ML093100169) (Staff Exhibits, Part 2, at 130). Internal corporate memoranda indicate that FENOC's management was concerned that such an early shutdown (three months earlier than the next planned refueling outage for Davis-Besse) would impose "direct costs" and "replacement power costs" upon the licensee, as well as increase the personnel dosage and generate additional radwaste. Staff Ex. 47, Discussion Agenda: DBNPS Bulletin 2001-01 Response, at unnumbered p. 2 (Oct. 2, 2001) (available in Staff Exhibits, Part 2, at 131).

commitments in addition to its response to Bulletin 2001-01, the NRC staff permitted Davis-Besse's continued operation until February 16, 2002.[17]

A visual inspection in March 2002, during the refueling outage, revealed a serious corrosion cavity in Davis-Besse's reactor vessel head, resulting from boric acid leakage.[18] In response to the discovery of the corrosion cavity, the NRC staff initiated an investigation. Upon its completion in 2003, the NRC's Office of Investigations reported, among other things, that some of FENOC's responses to the NRC's communications during 2001 were materially incorrect and therefore violated 10 C.F.R. § 50.9(a).[19] And on January 4, 2006, the NRC issued the Enforcement Order against Mr. Geisen, charging that he had "engaged in deliberate misconduct by deliberately providing FENOC and the NRC information that he knew was not complete or accurate in all material respects to the NRC, a violation of 10 CFR 50.5(a)(2)."[20] The Enforcement Order barred Mr. Geisen from working in the regulated nuclear industry for five years, until January 4, 2011.

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[17] *See* Memorandum from William D. Travers, Executive Director for Operations, to the Commissioners, entitled "Status of FirstEnergy Nuclear Operating Company Response to Nuclear Regulatory Commission (NRC) Bulletin 2001-01, 'Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles'" (Dec. 6, 2001) (ML022700362).

[18] Enforcement Order at 2-3.

[19] Geisen Ex. 23, OI Report No. 3-2002-006 (Aug. 22, 2003) (selected portions) (ML092740337) (date illegible on, or missing from, Ex. 23, but specified in Tr. at 2169 (Dec. 12, 2008)). Section 50.9(a) requires that information provided to the Commission as required by statute, or by the Commission's regulations, orders, or license conditions "be complete and accurate in all material respects."

[20] Enforcement Order at 14. The NRC simultaneously issued enforcement orders against two other FENOC employees who, like Mr. Geisen, had been involved in the cavity corrosion problem at Davis-Besse. *See Dale Miller*, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Jan. 4, 2006), 71 Fed. Reg. 2579 (Jan. 17, 2006); *Steven Moffitt*, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Jan. 4, 2006), 71 Fed. Reg. 2581 (Jan. 17, 2006). Earlier, the NRC had issued a fourth enforcement order concerning the same matter. *See Andrew Siemaszko*, Order Prohibiting Involvement in NRC-Licensed Activities (Apr. 21, 2005), 70 Fed. Reg. 22,719 (May 2, 2005).

While the NRC staff was proceeding with investigation and enforcement activities, DOJ initiated a criminal proceeding against Mr. Geisen in the United States District Court for the Northern District of Ohio. DOJ obtained a grand jury indictment against Mr. Geisen in January 2006, based on many of the same facts upon which the NRC staff relied in the Enforcement Order.[21]

Mr. Geisen challenged both the criminal charges and the Enforcement Order. Before the Commission, he sought a hearing, which was granted but later held in abeyance pending completion of the criminal trial.[22] The criminal case resulted in a conviction on three counts, including one based on a document (Serial Letter 2744) upon which the NRC staff also had relied in its Enforcement Order.[23] In May 2008, the trial judge sentenced Mr. Geisen to three years probation (that is, through May 2011), during which time he is prohibited from working in the nuclear power industry.[24] Mr. Geisen's criminal conviction was recently upheld on appeal.[25]

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[21] Indictment, *United States v. Geisen*, No. 3:06CR712 (N.D. Ohio Jan. 19, 2006) (appended as Attachment A to *NRC Staff Motion to Hold the Proceeding in Abeyance* (Mar. 20, 2006)) (Indictment). The indictment charged Mr. Geisen with five counts of knowingly and willfully concealing and covering up material facts, regarding the condition of Davis-Besse's reactor vessel head and the nature and findings of previous inspections of the reactor vessel head, with respect to: (Count 1) documents and communications occurring between September 4, 2001, and February 16, 2002, generally; (Count 2) Serial Letter 2735 (Oct. 17, 2001), specifically; (Count 3) Serial Letter 2741 (Oct. 30, 2001), specifically; (Count 4) Serial Letter 2744 (Oct. 30, 2001), specifically; and (Count 5) Serial Letter 2745 (Nov. 1, 2001), specifically.

[22] CLI-07-6, 65 NRC 112 (2007).

[23] LBP-09-24, 70 NRC __ (slip op. at 7 n.3).

[24] Following issuance of LBP-09-24, the district court lifted the condition of Mr. Geisen's probation banning him from employment in the nuclear industry. *See United States v. Geisen*, No. 3:06-CR-712, 2009 WL 4724265, at *1 (N.D. Ohio Dec. 2, 2009). *See also United States v. Geisen*, No. 3:06-CR-712, Transcript of Sentencing Hearing Before the Honorable David A. Katz, United States District Judge (May 1, 2008) (appended as Ex. C to Letter from Richard A. Hibey to the Licensing Board (June 24, 2008) (ML081910153)); Notice and Order (regarding Conference Call) (July 17, 2008) at 3 (unpublished).

[25] *United States v. Geisen*, No. 08-3655, 2010 WL 2774237 (6th Cir. July 15, 2010).

Shortly after the sentencing, Mr. Geisen moved to lift the Commission's abeyance order. The Board agreed and conducted an expedited hearing.[26] The Staff relied principally on the following evidence: (i) the six communications themselves;[27] (ii) four "trip reports" describing business trips taken by Mr. Prasoon Goyal, one of Mr. Geisen's subordinates, associated with the 2001 announcement that the Oconee Nuclear Station had experienced boron leakage;[28] (iii) two condition reports and a photograph that Mr. Geisen would have seen during the 2000 refueling outage (RFO 12); (iv) a June 27, 2001 memorandum prepared by Mr. Goyal, reviewed by Mr. Goyal's supervisor (Mr. Theo Swim) and approved by Mr. Geisen; and (v) certain of Mr. Goyal's e-mail correspondence, of which Mr. Geisen was a direct or copied recipient.[29]

Following the hearing, the majority ruled in favor of Mr. Geisen, finding that the Staff had failed to show by a preponderance of the evidence that Mr. Geisen had *knowingly* (rather than mistakenly) provided the agency incomplete and inaccurate information. Much of the majority's decision turned upon its findings both as to Mr. Geisen's state of mind at the time of the erroneous, incomplete or misleading statements, and as to his involvement in and contribution to those statements.[30] The majority declined the Staff's invitation to use Mr. Geisen's criminal conviction to "collaterally estop" him from maintaining that he lacked the requisite "knowing" state of mind.

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[26] Memorandum and Order (Summarizing Conference Call) (Nov. 3, 2008) (unpublished). The hearing was held December 8-12, 2008.

[27] *See* LBP-09-24, 70 NRC __ (slip op. at 17, Table 1).

[28] *See id.* at __ (slip op. at 18, Table 2).

[29] *See id.* at __ (slip op. at 19, Table 3).

[30] *Id.* at __ (slip op. at 20-21).

Judge Hawkens dissented from the majority's rulings.[31] He concluded that because of Mr. Geisen's criminal conviction, the NRC was required under the collateral estoppel doctrine to find that Mr. Geisen had knowingly provided the agency with materially incomplete and inaccurate information.[32] He also found that, regardless of whether collateral estoppel was applied, the Staff had demonstrated by a preponderance of the evidence that Mr. Geisen had the requisite knowledge that his statements were incomplete, misleading, and/or inaccurate.[33]

II. DISCUSSION

A. Standards Governing Petitions for Review

We may take discretionary review of a licensing board's initial decision.[34] In deciding whether to grant review, we give due weight to the existence of a substantial question with respect to the following considerations:

> (i) a finding of fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
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> (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
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> (iii) the appeal raises a substantial and important question of law, policy, or discretion;
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> (iv) the conduct of the proceeding involved a prejudicial procedural error; or
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> (v) any other consideration we determine to be in the public interest.[35]

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[31] *Id.* at ___ (slip op., Dissenting Opinion).

[32] *Id.* at ___ (slip op., Dissenting Opinion at 2-21).

[33] *Id.* at ___ (slip op., Dissenting Opinion at 21-61). Judge Hawkens also considered the five-year suspension reasonable, given the gravity of, and circumstances surrounding, Mr. Geisen's asserted offense. *Id.* at __ (slip op., Dissenting Opinion at 62-65).

[34] 10 C.F.R. § 2.341(b)(4).

[35] *Id*.

The Staff asserts that the Board made not only erroneous factual findings but also mistakes as to both substantive and procedural law. As discussed below, we agree that the Staff raises substantial questions as to factors (i), (ii), (iii), and (iv). We therefore grant the Staff's petition for review. But after considering the Staff's arguments, we uphold the decision of the Board majority to overturn the Enforcement Order. While we find the factual questions close, as an appellate tribunal, our fact-finding capacity and role are limited to a record review, and our review of the record does not show that the majority's findings of fact are clearly erroneous. We also agree with the Board majority's key legal rulings, including its refusal to apply collateral estoppel.

Given that the issues in this case, factual and legal, have been sharply contested, and in view of the vigorous and thoughtful disagreement among the members of the Board, we explain our view of the case in some detail.

B. Analysis

1. Threshold Legal Issue: The Board's Assessment of Mr. Geisen's State of Mind

The majority offered a summary description of its approach to determining Mr. Geisen's state of mind. Because his state of mind is a critical issue in this proceeding and this appeal, we set forth the summary as follows:

> Fundamental to our decision today is the concept that . . . "knowledge" does not necessarily follow simply from previous exposure to individual facts. Instead, to have knowledge, an individual must have a current appreciation of those facts and of what those facts mean in the circumstances presented.
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> In the circumstance of this case, it is not just the absorption of the key facts that is in issue. Beyond knowing the existence of those facts, to be found liable for a knowing misrepresentation Mr. Geisen had to know of their significance. Crucial in this respect was that Mr. Geisen knew the Davis-Besse plant had always had a problem with leaking flanges, and had a general understanding that inspections were made more difficult – but not, in his mind, impossible – by the geometry of the head and its access ports. He also, for entirely valid and understandable reasons, believed – mistakenly, along with many others – that the reactor vessel head had been cleaned after the inspection in 2000, and this influenced some of what he represented to the NRC.

> In sum, Mr. Geisen filtered incoming facts against this always limited, and sometimes mistaken, knowledge base, and was slow to recognize that the new facts that he did absorb heralded a new era of problems. But without such recognition, he did not attain the degree of "knowledge" sufficient to establish guilty misrepresentation – rather than innocent mistakenness fueled by disinformation coming from his co-workers and elsewhere within the company.
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> Thus, the question before us is not whether Mr. Geisen could have done a better job or should have known that – or should have taken steps to determine whether – the information being provided to the NRC was inaccurate or incorrect. Rather, the question was whether the Staff has proven that he had actual knowledge, at the time the submissions were made, that the information being provided was false and that he deliberately acted contrary to that knowledge.[36]

The Staff construes the majority's approach as establishing a "knowledge hierarchy" for determining a person's state of mind.[37] Pointing to various passages in the Board decision, the Staff also concludes that the Board has created a new "Five-Factor Test":

- The wrongdoer must be an expert in the particular matter at issue;[38]
- The wrongdoer must not be busy with other important matters during any relevant time period;[39]
- The matter at issue must be within the wrongdoer's job description and permanently assigned duties;[40]
- The wrongdoer must not only read written communications concerning the matter at issue, but must also act upon or otherwise respond positively to the communication in a way that conforms to the majority's "Knowledge Hierarchy";[41] and
- The wrongdoer must have knowledge of not only the content of any relevant document, but also its context and implications.[42]

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[36] LBP-09-24, 70 NRC ___ (slip op. at 21-22) (emphasis omitted).

[37] Staff Petition at 4-9.

[38] *Id.* at 4 (citing LBP-09-24, 70 NRC __ (slip op. at 25, 60, 86, 126, 133)).

[39] *Id.* (citing LBP-09-24, 70 NRC __ (slip op. at 24, 57, 75, 88, 95, 96 n.147, 139 n.172, 141)).

[40] *Id.* (citing LBP-09-24, 70 NRC __ (slip op. at 12-13, 24, 60, 70, 88)).

[41] *Id.* at 5 (citing LBP-09-24, 70 NRC __ (slip op. at 31-33)).

[42] *Id.* (citing LBP-09-24, 70 NRC __ (slip op. at 21, 32, 58, 64-65, 112)).

The Staff asserts that this "new paradigm"[43] is far more difficult to satisfy than the "preponderance of the evidence" standard established under the Administrative Procedure Act.[44] Indeed, the Staff claims that this new standard "renders it nearly impossible to establish that an individual acted deliberately," and thereby would erode substantially the NRC's enforcement program.[45] According to the Staff, "even an admission of actual knowledge and deliberate action might not be enough to meet the 10 C.F.R. § 50.5 deliberate misconduct requirements [as construed by the majority] if, for example, evidence showed the individual was busy with other important job matters or the pertinent matter was not within his job description."[46] Moreover, the Staff argues, this new standard would undermine the enforcement program's deterrent effect on people who otherwise might submit incomplete and/or inaccurate information to the NRC.[47]

The Staff's entire line of argument raises the key issue on which the majority and Chief Judge Hawkens differed: What constitutes "knowledge" for purposes of 10 C.F.R. § 50.5(a)(2)?[48] Because determinations of "knowledge" are factual by their very nature, the factors pertinent to such determinations in one proceeding are dictated largely by the facts and context of that case, and may be inappropriate in another proceeding. For this reason, we

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[43] *Id*.

[44] *Id.* at 4 (citing Final Rule, Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991)).

[45] *Id.* at 5.

[46] *Id*.

[47] *Id.* at 5-6 (citing Staff Ex. 1, NRC Enforcement Policy, at 4 (available in Staff Exhibits, Part 1, at 2, 6)).

[48] Section 50.5(a)(2) prohibits a person from contributing to the submission of information to the NRC that he knows was incomplete or inaccurate in some material respect. As Judge Hawkens succinctly put it in his Dissenting Opinion, "[t]he sole issue here – as in his criminal trial – is whether he knew the information was materially incomplete and inaccurate at the time it was submitted to the NRC." LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 24 n.15).

cannot accept the Staff's argument that the majority set forth a new "knowledge" test that would have precedential value in future enforcement adjudications.[49] Rather, we interpret the majority's statements simply as a detailed explanation of its reasoning in arriving at its state-of-mind findings in this particular case.

Moreover, because the facts of every enforcement case are unique, the method of a board's fact-finding likewise will have to be somewhat different in each proceeding, just as the Staff's own fact-finding and sanctions determinations are handled on a case-by-case basis.[50] The Staff's argument regarding a "new legal standard" disregards this reality and leads to the illogical conclusion that any board adjudicating an enforcement case necessarily establishes a new set of legal standards.[51]

Further, we agree with the majority that, for purposes of section 50.5, "knowledge" of a fact requires not only an awareness of that fact but also an understanding or recognition of its significance. We find support for this conclusion in analogous areas of both civil and criminal law. For instance, the Sixth Circuit offered the following description of the criminal law prohibiting fraudulent statements under 18 U.S.C. § 1001(a)(2) (barring "materially false, fictitious, or fraudulent statement[s] or representation[s]" in matters within the federal government's jurisdiction):

> [A] false statement charge under § 1001, like a perjury charge, effectively demands an inquiry into the Defendant's state of mind and his intent to deceive at the time the testimony was given, and the entire focus of a perjury inquiry centers upon what the testifier knew and when he knew it, in order to establish[]

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[49] Board decisions carry no precedential weight, so even were the majority seeking to establish such a test here, the test would not be controlling in other proceedings. *See*, *e.g.*, *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 263 n.40 (2008); *Aharon Ben-Haim*, CLI-99-14, 49 NRC 361, 364 (1999).

[50] *See* Tr. at 2014-15, 2021, 2038 (Staff witness Kenneth G. O'Brien).

[51] Staff Petition at 6. *See also id*. at 5 ("new [legal] paradigm").

> beyond a reasonable doubt that he knew his testimony to be false when he gave it.[52]

Similarly, concerning the more general subject of criminal guilt, the Supreme Court has observed that the words "'knowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness."[53] Along the same lines, the Second Circuit has held that knowledge may suffice for criminal culpability "if extensive enough to attribute to the knower a 'guilty mind,' or knowledge that he or she is performing a wrongful act."[54] Likewise, courts have held that the civil law concept of "assumption of risk" requires not merely general knowledge of a risk but also "that the risk assumed be specifically known, understood and appreciated."[55]

The Staff further complains that "the Majority applied its new standards for proving knowledge after the close of the record, without notice, without providing the Staff an

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[52] *United States v. Ahmed*, 472 F.3d 427, 433 (6th Cir. 2006) (internal quotation marks and citation omitted, second alteration in original), *cert. denied*, 551 U.S. 1132 (2007). *See also United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) ("Willfulness . . . means nothing more in this context than that the *defendant knew that his statement was false when he made it* or . . . consciously disregarded or averted his eyes from its likely falsity." (emphasis added; citation omitted)); *United States v. Curran*, 20 F.3d 560, 567 (3d Cir. 1994) ("To convict a person accused of making a false statement, the government must prove not only that the statement was false, but that *the accused knew it to be false*." (emphasis added)).

Some circumstances surrounding a person's false statement may be "so obvious that knowledge of its character fairly may be attributed to him." *United States v. Figueroa*, 720 F.2d 1239, 1246 (11th Cir. 1983). *See*, *e.g.*, *United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir.) ("Any reasonable person would have realized that in today's society the bizarre bearing of shopping bags filled with large sums of cash signaled some form of illegal activity"), *cert. denied*, 479 U.S. 847 (1986). *See also United States v. Burgos*, 94 F.3d 849, 869 (4th Cir. 1996); *Williams v. United States*, 379 F.2d 719, 723 (5th Cir. 1967) (concerning contributory negligence where the risks are "patently obvious"). But, as the split Board decision shows, this proceeding does not present so "obvious" a situation.

[53] *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005).

[54] *United States v. Figueroa*, 165 F.3d 111, 115-16 (2d Cir. 1998).

[55] *Lambert v. Will Bros. Co.*, 596 F.2d 799, 802 (8th Cir. 1979) (Arkansas law). *Accord Bonds v. Snapper Power Equip. Co.*, 935 F.2d 985, 988 (8th Cir. 1991) (same); *Kennedy v. U.S. Constr. Co.*, 545 F.2d 81, 84 n.1 (8th Cir. 1976) (same); *Sun Oil Co. v. Pierce*, 224 F.2d 580, 585 (5th Cir. 1955) (Texas law).

opportunity to present evidence focusing on these standards, and then relied heavily on these standards in rendering its decision."[56] The Staff points to federal case law for the proposition that, "'when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust.'"[57] But, as we explained above, the Board majority applied no "new legal standard" here. Rather, it merely examined the particular facts of this case (and their full context) thoroughly. Indeed, had the majority not explained how it had arrived at its findings of fact, it would have failed to comply with its responsibilities under the Administrative Procedure Act to issue a "reasoned decision."[58]

Last, the Staff asserts that even if the new "Five-Factor Test" is appropriate, the majority nonetheless applied it inconsistently by "failing to properly consider" the Staff's evidence.[59] Although couched in legal terms, this argument is at bottom a factual challenge to the way the majority weighed and balanced the conflicting evidence in this proceeding. We consider and reject each of the Staff's specific factual challenges below. We add only that the majority's decision to give greater weight to Mr. Geisen's evidence does not mean that the majority

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[56] Staff Petition at 6.

[57] *Id.* (quoting *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), and citing *Alabama v. Shalala*, 124 F. Supp. 2d 1250, 1263-64 (M.D. Ala. 2000)).

[58] *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.'"). *See generally Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000) (referring to a petitioner's right to a "reasoned adjudicatory decision").

[59] Staff Petition at 6. *See generally id.* at 6-9.

improperly failed to consider the Staff's evidence. Indeed, the majority cited and addressed the Staff's exhibits and testimony repeatedly throughout the fact-finding section of LBP-09-24.[60]

2. Factual Challenges

a. The Burden to Show "Clear Error"

The Staff claims that four significant findings of fact made by the majority were "clearly erroneous." To show clear error, the Staff must demonstrate that the majority's findings are "not even plausible in light of the record viewed in its entirety."[61] This is a difficult standard to meet. The Staff's brief did not cite an example – nor have we found one – where the Commission has overturned a Board finding of fact due to "clear error."

In each instance, the record does contain some evidence that supports the Staff's point of view. Indeed, we have no doubt that based on the record, the Board permissibly could have inferred that Mr. Geisen knowingly misled the NRC, and that the outcome of this proceeding plausibly could have been different. But this is not a reason to reverse the majority.[62] In as hard-fought a case as this, we would not expect the record to support one party only. The fact that the majority accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision.

The Board had before it the totality of the evidence – including the testimony from a five-day hearing, hundreds of pages of documentary evidence, and transcripts from investigative

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[60] *See* LBP-09-24, 70 NRC __ (slip op. at 54-119), which includes over 100 citations to or quotations from Staff exhibits, and still more citations to Staff witnesses' testimony, Staff pleadings and the Enforcement Order.

[61] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 189 (2004) (internal quotation marks omitted) (quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995) (in turn quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985))).

[62] *See generally Pierce*, CLI-95-6, 41 NRC at 382 ("The Staff's petition . . . demonstrates only that the record evidence in this case may be understood to support a view sharply different from that of the Board . . . . [but] does not show that the Board's own view of the evidence was 'clearly erroneous.'").

interviews and a criminal trial. We will not lightly overturn the majority's ruling, particularly where much of that evidence is subject to interpretation.[63] In addition, findings of fact that turn – as they do here – on witness credibility receive our highest deference.[64] A board's findings regarding a particular witness's knowledge or state of mind depend, as a general rule, largely on that witness's credibility.[65] In this matter, the majority relied extensively on Mr. Geisen's demeanor and credibility as a witness.[66]

This enforcement action turns on Mr. Geisen's state of mind: whether he knew that the information presented to the NRC in response to Bulletin 2001-01 was false. The parties stipulated that certain material information Mr. Geisen provided to the NRC during two presentations to the NRC, a conference call, and in three serial letters described in the

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[63] For example, the Staff cites a portion of Mr. Geisen's testimony to show that Mr. Geisen understood the requirements of Bulletin 2001-01. *See* Staff Petition at 21 (citing Tr. at 1820, 1823-28). It is unclear from the exchange at the evidentiary hearing, however, whether Mr. Geisen was testifying as to what he understood in the Fall of 2001 or what he understood during the hearing while reading that same Bulletin. *See* discussion at text associated with notes 106-107, *infra*.

[64] *See Watts Bar*, CLI-04-24, 60 NRC at 189 ("Our deference is particularly great where 'the Board bases its findings of fact in significant part on the credibility of the witnesses.'" (quoting *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003))). *See also PFS*, CLI-03-8, 58 NRC at 27, 29, 36; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 & n.6 (2001), *petition for review denied*, *Orange County v. NRC*, 47 Fed. Appx. 1, 2002 WL 31098379 (D.C. Cir. 2002); *Ben-Haim*, CLI-99-14, 49 NRC at 364 & n.2.

[65] *Cf. Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-85-30, 22 NRC 332, 396 (1985) ("The Board concludes that Mr. Herbein's testimony that he did not know about the early high incore temperature readings is . . . not credible, in light of his two earlier statements"); *Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification*, LBP-87-15, 25 NRC 671, 783 (Recommended Decision 1987) ("While we would not expect the [control room operators] to recall details of such discussions, we find not credible their professed inability to remember anything about the knowledge of their fellow [control room operators], particularly in light of the very striking pattern of their joint involvement in manipulation that emerges from the records analysis.").

[66] *See, e.g.*, LBP-09-24, 70 NRC __ (slip op. at 21, 24, 76, 83 n.133, 85 n.138, 116, 133 n.169).

Enforcement Order was false.[67] Although the investigation into this matter included interviews with over thirty Davis-Besse employees, the majority found that there was no direct evidence – for example, witness testimony – presented to demonstrate that Mr. Geisen knew more than he asserted that he did.[68]

Instead, the success of Staff's case depended upon whether the Staff could convince the Board that knowledge permissibly could be inferred through circumstantial evidence. First, the Staff demonstrated that Mr. Geisen had admitted that he was aware of certain facts concerning the condition of the reactor vessel head. Second, the Staff demonstrated that Mr. Geisen had been on the recipient list of documents and e-mails that discussed the reactor head and inspections, so that the Board could infer that Mr. Geisen "knew" the information contained in those documents. Ultimately, the Board's decision came down to weighing Mr. Geisen's testimony that he did not realize the information provided to the NRC was false (as well as circumstances making Mr. Geisen's version plausible), against the Staff's circumstantial evidence that he must have recognized its falsity when he presented it or concurred in its submission. The Board majority believed Mr. Geisen; Judge Hawkens did not.

The majority largely accepted Mr. Geisen's explanations of why he did not appreciate that the information provided to the NRC was false when he concurred in its presentation – either because he had relied on other people to verify the accuracy of certain information;[69]

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[67] *See NRC Staff Hearing Submissions*, Attachment 2 (Stipulated Facts) (Dec. 3, 2008). *See generally* Enforcement Order.

[68] *See* LBP-09-24, 70 NRC __ (slip op. at 27-28).

[69] For example, Mr. Geisen apparently relied on Andrew Siemaszko, who had performed the 2000 inspection and cleaning and who was assigned the task of determining which nozzles could be seen on the videotapes from past inspections, and also on Prasoon Goyal, senior mechanical engineer for Design Basis Engineering. *See id.* at __ (slip op. at 87). *See also id.* at __ (slip op. at 104 (citing Tr. at 1725) ("[T]here is no evidence that anyone else on the FENOC team conveyed to Mr. Geisen during the course of preparing slides and planning the presentation that the information was incorrect.")).

because he had focused only on his own area of responsibility in verifying the technical accuracy of the correspondence sent to NRC;[70] or because he had focused his attention on responding to the Bulletin's request for information regarding future rather than past inspections.[71] We observe that none of these circumstances necessarily "proves" that Mr. Geisen did not know that the information was false. But the majority found Mr. Geisen credible on this point, leading to its ultimate fact finding that Mr. Geisen did not know at the time that his representations were false or misleading.

Although recognizing our highly deferential standard of review for Board findings of fact, the Staff argues that the majority's findings with respect to these circumstances are so contrary to the weight of the evidence as to amount to mere rationalizations. The Staff directs our attention to a number of instances where the record supported findings different from those of the majority, or where the Staff claims the majority's findings lack record support. We consider each of these in turn below.

b. Specific Claims of Error

(1) WHETHER MR. GEISEN KNEW THE BULLETIN'S REQUIREMENTS AND INSPECTION LIMITATIONS

The Staff challenges the majority's finding that Mr. Geisen did not know that two important factors prevented 100% visual inspections of the reactor vessel head at Davis-Besse during the prior three refueling outages.[72] The majority accepted Mr. Geisen's testimony that (1) he did not realize that the inspection method Davis-Besse had used in the past precluded

[70] *See id.* at __ (slip op. at 58-59 (citing Tr. at 1640)).

[71] *See id.* at __ (slip op. at 85 (citing Tr. at 1826-27)).

[72] Staff Petition at 19-21.

viewing the topmost nozzles on the reactor vessel head, and (2) he did not know boron deposits on the reactor head also interfered with the inspections.[73]

The Board's findings of fact on the inspection limitations go to the heart of this enforcement action. To persuade the NRC not to shut down the reactor prior to its next scheduled refueling outage, management at Davis-Besse sought to show that, at their plant, there was no danger posed by the circumferential nozzle cracking seen at other plants. To that end, FENOC sought in its responses to Bulletin 2001-01 to show that the CRDM nozzles had shown no sign of cracking in prior inspections.

It is undisputed that it was impossible to view each and every nozzle that penetrated the reactor head during the inspections done during certain refueling outages.[74] At the time, Davis-Besse's employees conducted these inspections by inserting a camera mounted on a rigid pole through "mouseholes" or "weep holes"[75] in the reactor service structure, in order to view the reactor head and penetrating nozzles ("camera-on-a-stick" method).[76] These inspections frequently were videotaped.[77] The curvature of the head, however, made it impossible to view the topmost nozzles when using the camera-on-a-stick method,[78] which was the method used during RFO 10, in 1996; RFO 11, in 1998; and RFO 12, in 2000.[79] In addition, boron deposits

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[73] LBP-09-24, 70 NRC __ (slip op. at 79-80, 83, 86-87).

[74] *See* Stipulated Facts at 4, 7 (referring specifically to Refueling Outages 10 (1996) (RFO 10), 11 (1998) (RFO 11), and 12 (2000) (RFO 12)).

[75] "Mouseholes" are 5" x 7" cutouts in the service structure that provide access to both the outside of the reactor vessel head and to the area between the head and the insulation. LBP-09-24, 70 NRC __ (slip op. at 10).

[76] *Id.* at __ (slip op. at 12).

[77] *Id.* at __ (slip op. at 11).

[78] Tr. at 854-55, 901 (Staff witness Melvin Holmberg).

[79] LBP-09-24, 70 NRC __ (slip op. at 11-12). *See also* Tr. at 866-67 (Staff witness Melvin Holmberg).

accumulating over the years further blocked the camera from capturing all or parts of the nozzles (although the head ostensibly was cleaned through either mechanical means or with water after each inspection).[80]

FENOC took several steps to overcome these inspection limitations. There had been a request, pending since 1994, to cut additional access holes in the reactor service structure in order to better maneuver the camera, although this plan was never carried out.[81] Ultimately, FENOC purchased for use in the 2002 inspection a camera mounted on a robotic rover that would be able to "crawl" over the rounded head to see the topmost nozzles.[82] In addition, because mechanical methods to remove boron deposits had not been successful after RFO 10 and RFO 11, a work order was issued to use demineralized water to clean the head after RFO 12 in 2000.[83]

FENOC's first response to the NRC's 2001 Bulletin seeking information on vessel head integrity was Serial Letter 2731, dated September 4, 2001, where FENOC stated that the 1998 and 2000 inspections showed flange leakage but no nozzle leakage.[84] On October 11, 2001, various managers from FENOC, including Mr. Geisen, met with the Commissioners' technical assistants to present the company's argument that the reactor could safely operate until scheduled RFO 13, in March 2002. Slides presented at this meeting indicated that inspection

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[80] *See* LBP-09-24, 70 NRC __ (slip op. at 60; 62-63); Tr. at 901, 1565.

[81] *See id.* at __ (slip op. at 30).

[82] Tr. at 1614-16.

[83] *See* Staff Ex. 20, Work Order at 1-13 (available in Staff Exhibits, Part 1, at 378-90). In actuality, the head was not completely cleaned as "boric acid crystal deposits of considerable depth" were left on the center top area of the head. *See* Staff Ex. 44, Letter from Gregory A. Gibbs, Piedmont Management & Technical Services, Inc., to Mark McLaughlin, Davis-Besse Nuclear Power Station (Sept. 14, 2001) at 1 (available in Staff Exhibits, Part 2, at 121, 121).

[84] *See* Stipulated Facts at 2-3.

tapes from the 1998 and 2000 refueling outages had been reviewed nozzle-by-nozzle,[85] despite the fact that the review (performed by another FENOC employee, Andrew Siemaszko) had not yet been completed. The slides stated that the reviews confirmed the absence of "popcorn" type boron deposits that would indicate leaking nozzles.[86]

Subsequent to the October 11 meeting, Mr. Siemaszko completed his review, which revealed that extensive boron deposits had blocked the camera from viewing a large number of nozzles during both inspections. Shortly thereafter, FENOC supplemented its Bulletin response with Serial Letter 2735, which acknowledged that by 1998, nineteen nozzles could not be seen in the inspections, and by 2000, twenty-four nozzles were obscured by boric acid deposits.[87] Serial Letter 2735 argued that, even disregarding the 1998 and 2000 inspections and starting with the 1996 inspection, the crack-growth-rate analysis showed that the reactor could operate safely until the 2002 refueling outage.[88]

It is undisputed that Mr. Geisen did not take part personally in any of the relevant past inspections (1996, 1998 and 2000). Mr. Geisen testified that, while he knew the "camera-on-a-

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[85] *See* Staff Ex. 55, FENOC Slides Presented at October 11, 2001 meeting with Commissioners' technical assistants, at 6-7 (available in Staff Exhibits, Part 2, at 163, 169-70).

[86] *See id.* at 7 (available in Staff Exhibits, Part 2, at 170).

[87] *See* Staff Ex. 11, Serial Letter 2735 (Oct. 17, 2001) at 2-3 (available in Staff Exhibits, Part 1, at 136, 142-43). Serial Letter 2735 claimed that the boric acid was "clearly" from flange leakage, not from nozzle leakage. *Id.* at 3 (available in Staff Exhibits, Part 1, at 143). According to the Stipulated Facts, Serial Letter 2735 understated the number of nozzles that were not viewed in the 1996, 1998, and 2000 inspections. *See* Stipulated Facts at 6-7.

[88] *See* Staff Ex. 11, Serial Letter 2735 at 1 (available in Staff Exhibits, Part 1, at 141) ("Accordingly, using the end of the outage in 1996 as the postulated worst-case time for an axial crack to reach a through-wall condition, the projected time for the crack to reach its critical through-wall circumferential size was determined based on the results from a[] Framatome ANP assessment. This [reactor vessel] Head Nozzle and Weld Safety Assessment demonstrates the postulated crack will take approximately 7.5 years to manifest into an ASME Code allowable crack size.").

stick" method FENOC had used in the past presented difficulties, he believed that a reliable inspection using this method was not impossible.[89]

The Staff objects to the majority's finding "that Mr. Geisen was only aware that the [camera-on-a-stick] inspection technique 'had its difficulties, but he was not aware that it physically precluded the ability to view all of the nozzles.'"[90] The Staff argues that Mr. Geisen "knew" that past inspections were inadequate because he knew that there was an outstanding request to cut additional holes in the service structure to facilitate inspections and cleaning. At the hearing, Mr. Geisen was asked repeatedly about this modification request. The Staff cites this exchange:

> Question: So going back again, the modification – you knew the modification [request] 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.[91]

The majority, however, addressed this very passage, pointing out that in the same line of questioning, Mr. Geisen had stated that he did not know that the entire head could not be reached without the modification:[92]

> [Question:] I'm talking about a modification that's been in place since 1994. And I'm 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. And you knew that, didn't you?

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[89] *See* Tr. at 1616; LBP-09-24, 70 NRC __ (slip op. at 79)).

[90] Staff Petition at 19 (quoting LBP-09-24, 70 NRC __ (slip op. at 79)).

[91] *Id.* (quoting Tr. at 1958-59).

[92] *See* LBP-09-24, 70 NRC __ (slip op. at 80-81).

> [Mr. Geisen:] No.[93]

Earlier in the same day of testimony, Mr. Geisen stated that he thought the requested modification would make head cleaning and inspection easier, but not that the modification was necessary for those activities:

> [Question:] And were you, aware that [the requested modifications] were necessary because you could not clean the head unless you had those access holes?
>
> [Mr. Geisen:] No.
>
> [Question:] So that was new information to you in this email[?]
>
> [Mr. Geisen:] I didn't view it as a requirement. I viewed it as Mr. Siemaszko's requesting those to make it easier to do the viewing and cleaning.[94]

Continuing with the same line of questioning, Staff counsel asked:

> [Question:] And [Bulletin 2001-01] was looking for inspections that were sufficient to verify whether those nozzle indications were present, correct?
>
> [Mr. Geisen:] Correct.
>
> [Question:] And this would require an inspection of the entire head. Is that correct?
>
> [Mr. Geisen:] That is correct.
>
> [Question:] So the fact that you could not access the head through these mouse holes sufficiently to clean it was a warning, wasn't it, that there were impediments to having that kind of complete inspection?
>
> [Mr. Geisen:] I did not take that statement that way when I read it.[95]

The majority also cited an August 17, 2001 e-mail message that, in its view, would have led Mr. Geisen to believe that it was not impossible to conduct a complete inspection. Mr. Geisen was sent a copy of an e-mail from the senior mechanical engineer for Design Basis

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[93] Tr. at 1958.

[94] *Id.* at 1872.

[95] *Id.* at 1873.

Engineering, Prasoon Goyal (who had conducted the 1996 inspection and cleaning), indicating that the 1998 inspection was a "good" inspection.[96]

Although the passages of testimony that Staff cites in its brief[97] suggest that Mr. Geisen's testimony on the subject was not entirely "uncontroverted," as the majority put it,[98] the majority nonetheless found that Mr. Geisen repeatedly testified that he did not know that the camera-on-a-stick method rendered all past inspections incomplete. In light of his testimony to that effect, we find plausible the majority's finding that Mr. Geisen did not realize that past inspections were unreliable per se.

The Staff also argues that Mr. Geisen must have known that past inspections were inadequate, because he testified that the reason he procured a rover (or "crawler") for RFO 13, in 2002, was that he "didn't view the camera on a stick as even a viable option anymore."[99] The majority, however, interpreted Mr. Geisen's decision to procure the rover as simply a choice to use newer, superior technology for inspections.[100] Because (the majority observed) a rover's

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[96] LBP-09-24, 70 NRC __ (slip op. at 79 (citing Staff Ex. 39); Staff Ex. 39, E-mail from Prasoon K. Goyal to sfyftch@framatech.com (Aug. 17, 2001) (available in Staff Exhibits, Part 2, at 111) ("Is it possible to go back to 1998 that is when a good head exam was done with no nozzle leakage[] (meaning not taking any credit for 2000 inspection)[?]")).

[97] *See* text associated with notes 91 and 93, *supra.*

[98] LBP-09-24, 70 NRC __ (slip. op. at 81).

[99] Staff Petition at 20 n.51 (quoting Tr. at 1880). The cited portion of the transcript reads as follows:

> [Question:] So you knew though that using a camera on a stick you would have had a problem with an inspection[?]
>
> [Mr. Geisen:] Correct. But even if we were doing a visual inspection in 2002, we'd already made plans to do it using our crawler. So I didn't view the camera on a stick as even a viable option anymore.

Tr. at 1879-80.

[100] LBP-09-24, 70 NRC __ (slip op. at 82 & n.131).

magnetic wheels would not work unless the head were clean, the majority also viewed Mr. Geisen's decision to procure a rover as evidence that Mr. Geisen believed that the head had been cleaned successfully after the 2000 inspection.[101] We find that the majority's interpretation of Mr. Geisen's actions with respect to procuring the rover was plausible. Consequently, Mr. Geisen's acquisition of a rover does not undermine the majority's finding that he did not know the extent of the limits of the past inspections.

The Staff next challenges the majority's finding that Mr. Geisen thought that the focus of Bulletin 2001-01 was on how *future* inspections should be conducted to deal with the problem of potential nozzle leakage.[102] The Staff argues that Mr. Geisen knew the Bulletin sought specific information concerning *past* inspections. The record shows that Mr. Geisen's testimony supports the majority's finding.[103] The majority also cited testimony by the Staff's witness that would indicate that the Bulletin reflected a strong interest in how licensees would conduct future inspections.[104] In contrast, the only evidence the Staff cites[105] to contradict Mr. Geisen's claim

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[101] *Id.*

[102] Staff Petition at 19 (citing LBP-09-24, 70 NRC __ (slip op. at 25, 84-87)). The majority found that Mr. Geisen understood that the purpose of the additional Bulletin responses was not to prove that the past inspections were adequate, but to identify shortcomings in past inspections with a view to "providing a plan to the NRC as to how future inspections would meet future regulatory requirements." LBP-09-24, 70 NRC __ (slip op. at 25). *See also id.* at 84-85 (citing Mr. Geisen's testimony at Tr. at 1826-27).

[103] *See* Tr. at 1828-29 ("[Mr. Geisen:] [T]he section you are pulling out on page 4, as I read through that whole paragraph, I take that as identifying where there is an identified industry shortfall in how we do inspections. Now, did I then take that industry-identified shortfall and go back . . . and apply that as new criteria that I should have been applying to inspections I have done in the past? No, I did not do that. I took it as front information, and then when I got to the part where it says, 'The . . . addressees,' on page 11, 'will provide the following information,' the intent was to provide that information to the best ability, not to go back and revise inspection criteria of inspections that were done two to four year[s] earlier."). *See also id.* at 1824-27.

[104] *See* LBP-09-24, 70 NRC __ (slip op. at 14 (citing Tr. at 1205 (testimony of Staff witness Dr. Hiser))). The cited portion reads:

> [T]he . . . overall goal [of the Bulletin] was to determine the status of each plant. We . . . did not have sufficient knowledge in terms of the inspections that

(continued . . .)

that he thought future inspections to be the Bulletin's main focus consists of portions of Mr. Geisen's testimony where he either seems to be stating his understanding of the Bulletin much later (at the time of the NRC hearing),[106] or where he states that he understood the Bulletin to make a distinction between future and past inspections.[107] Such statements are not enough to convince us that the majority made a clear error in its finding on this issue.

(2) WHETHER MR. GEISEN VIEWED VIDEOTAPES OF PAST INSPECTIONS IN EARLY OCTOBER 2001

The Staff claims that the majority erred in finding that Mr. Geisen had not seen inspection videotapes "in running fashion" in early October 2001 because Mr. Geisen admitted seeing "portions" of the tapes.[108] As discussed below, it is clear from the record that Mr. Geisen did view portions of the inspection videos at issue, and the majority acknowledges this.[109] In this regard, the Staff articulates no error.

> licensees had implemented at previous outages before the Bulletin was issued. . . . [S]o . . . we didn't know if those inspections were adequate to address the concerns of the Bulletin. The Bulletin also then gathered information about future inspection plans by licensees.

Tr. at 1205. *See also* LBP-09-24, 70 NRC __ (slip op. at 15 (citing Tr. at 1254) (Staff witness Dr. Hiser)). The cited portion reads:

> [T]he purpose for gathering information . . . . wasn't so much to force actions by licensees, but [to] let them know . . . what appropriate actions were, and enable them to demonstrate that their prior actions met the bulletin['s] . . . expectations, or to give them the opportunity to implement inspections, in the future, that met the expectations of the bulletin.

Tr. at 1254.

[105] Staff Petition at 20-21.

[106] Tr. at 1820, 1826-27.

[107] *Id*. at 1878.

[108] Staff Petition at 21-22.

[109] LBP-09-24, 70 NRC __ (slip op. at 98).

The Staff's true concern appears to focus on the majority's use of the term "in running fashion" to describe how the inspection videotapes had been reviewed. The majority used this term at various points in its decision[110] but apparently intended "in running fashion" not to mean merely viewing a moving video image, but viewing the videos in "the manner in which the Staff played the tapes for the Board during the evidentiary hearing."[111] The majority, in fact, acknowledged that Mr. Geisen had seen "portions of the past inspection videotapes."[112]

The majority found that the first time Mr. Geisen saw the inspection videos was sometime between October 3 and October 11, 2001, when Mr. Geisen met with Andrew Siemaszko concerning an assignment Mr. Siemaszko had been given relating to the Bulletin response.[113] Mr. Siemaszko was to review the tapes of the previous inspections and create a table showing which nozzles could be confirmed not to be cracked. During the meeting with Mr. Siemaszko, Mr. Geisen either looked at portions of videotapes of the inspections, or at still shots taken from digitized versions of the tapes that Mr. Siemaszko had made in order to facilitate his review. Mr. Geisen testified at the hearing that, at this meeting, Mr. Siemaszko had shown him still shots to demonstrate the criteria he was using to check each nozzle:

> [Mr. Geisen:] I swung by [Mr. Siemaszko's] desk and asked him how he's doing and that's when he informed me that he initially I guess attempted to do the frame by frame looking at videotape and that wasn't working out very well because every time he paused it, or whatever, you got a disturbance in the picture. It didn't pause well or you get lines or whatever. So he had transferred stuff over or was having the Training Department copy all the VHS tapes over to

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[110] *Id.* at __ (slip op. at 98, 131, 139).

[111] *Id.* at __ (slip op. at 98). The transcript shows that the Board spent a fair amount of time on the first day of the hearing reviewing inspection tapes, with Staff witness Melvin Holmberg describing what can be seen on the tapes. *See* Tr. at 877-926.

[112] LBP-09-24, 70 NRC __ (slip op. at 98) (emphasis omitted).

[113] *Id.* at __ (slip op. at 97-99). *See also id*. at __ (slip op. at 75-76) (noting that another engineering department held the inspection tapes and that "no evidence exists to establish any physical connection between Mr. Geisen and any reactor vessel head inspection videotapes until mid-October of 2001") (emphasis omitted).

> CD format, a digital format so that he could review them on his computer and then he could just with the space key or the up and down arrow key go digital frame by frame and then they came up clear.[114]

The testimony at the hearing supported the majority's view that Mr. Geisen saw only brief portions of the inspection videos:

> [Question:] Did there ever come a time during the [one-hour meeting with Mr. Siemaszko] that he hit play and let the tape roll for you so you could watch it the way we watched it the other day during this hearing?
>
> [Mr. Geisen:] No. The real focus was he was – the discussion went more along the lines of not here's the video, but here's the still frame and this is the methodology that I'm using. Because I was really asking about the methodology, what was his acceptance criteria, what was the methodology he was using.[115]

The Staff notes that the majority acknowledged that Mr. Geisen's actions would be "tainted" if he saw videos "in running fashion."[116] It then cites portions of the transcript of an Office of Investigations interview with Mr. Geisen that took place in October 2002, where Mr. Geisen stated that he had looked at some "portions" of the tapes sometime in October 2001.[117] But the Staff seemingly does not recognize, or does not acknowledge, that the majority decision uses the term "in running fashion" to mean more than simply that the images were moving. Further, even if the majority meant "in running fashion" to refer to *any* moving image, the Staff does not explain what difference this "error" of fact would make to the outcome of this proceeding.

Possibly, the Staff is echoing Judge Hawkens's observation that Mr. Geisen likely "reviewed closely all three inspection videos" immediately after his meeting with Mr. Siemaszko and realized that the inspections were more limited in scope than the information submitted to

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[114] Tr. at 694-95.

[115] *Id.* at 1697.

[116] Staff Petition at 21 n.54 (citing LBP-09-24, 70 NRC __ (slip op. at 139-40)).

[117] *Id.* at 22-23 (citing Staff Ex. 79, Office of Investigations Interview (Oct. 29, 2002) at 108-09, 144-45 (ML100480577).

the NRC would reveal.[118] In the sections of the Office of Investigations interview that the Staff cites, however, Mr. Geisen only states that he saw "portions" of the tapes.[119] The Staff offers no evidence showing that Mr. Geisen performed the "careful" review that Judge Hawkens suggests he might have done.

Nothing in the Staff Petition contradicts the majority's interpretation, nor does it persuade us that the majority's finding on this point would make a difference in the outcome of the proceeding. Therefore, we find no clear error in the majority's statements that Mr. Geisen did not view the inspection videotapes "in running fashion" at the beginning of October 2001.

(3) WHETHER MR. GEISEN KNEW HE WAS RESPONSIBLE FOR THE SERIAL LETTERS' TECHNICAL ACCURACY

The Staff argues that the majority erred in finding that Mr. Geisen was "specifically not 'the FENOC manager responsible for ensuring the completeness and accuracy' of the content in Serial Letter 2731," and in finding that his sole role in the review process was to determine whether the reviewed documents were inconsistent with his own department's knowledge or policies.[120] The Staff argues that Mr. Geisen "knew he was responsible for the Technical Accuracy of the Serial Letters."[121] The Staff claims that the majority's finding contradicts both the plain language of the "Green Sheet"[122] and Mr. Geisen's own testimony.[123]

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[118] *See* LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 40). The majority opinion responds to this comment, which it calls "speculation." *Id.* at __ (slip op. at 139).

[119] *See, e.g.*, Staff Ex. 79, at 61, 108-09, 156.

[120] Staff Petition at 23 (quoting LBP-09-24, 70 NRC __ (slip op. at 23), and citing *id.* at __ (slip op. at 17, 59)).

[121] *Id*.

[122] *Id.* (citing Staff Ex. 10, FENOC, "NRC Letters – Review and Approval Report (Serial No. 2731") at 3 (available in Staff Exhibits, Part 1, at 131, 135)). The "Green Sheet" is the cover page to a draft document, which was circulated as part of the internal review and approval process employed by FENOC at Davis-Besse. *See* Tr. at 1638-43.

[123] Staff Petition at 23 (citing Tr. at 1902).

Apparently, the Staff's dispute is not so much with the majority's finding that Mr. Geisen was not the manager in charge of responding to the Bulletin, as it is with the significance that the majority attributed to that finding. The Staff argues that the majority made a legal ruling that a person cannot be held responsible for knowingly concurring in materially incomplete and inaccurate representations as long as he can point to someone more directly responsible for the representations.[124] But the majority made no such ruling. Rather, the majority found that Mr. Geisen did not know the truth because of the manner in which he carried out his duties with respect to the review.

The majority's finding has support in the record.[125] Mr. Geisen testified that he did not understand that he was personally responsible for verifying the accuracy of every technical representation in the Serial Letters:

> [Question:] During the course of the litigation of this case, I take it, you have read the back of the green sheet and what it tells signatories that [*sic*] their responsibilities are, correct?
>
> [Mr. Geisen:] Correct.
>
> [Question:] And one of the responsibilities for a manager is to verify the technical accuracy, correct?
>
> [Mr. Geisen:] Correct.
>
> [Question:] At the time that you signed the green sheet, had you gotten any training in what your responsibility was?

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[124] The Staff describes the majority's ruling as finding that "because Mr. Geisen was not the responsible manager, he was not culpable for the materially incomplete and inaccurate representations contained in Serial Letter 2731." *Id*. According to the Staff, the majority held that, even if Mr. Geisen knew Serial Letter 2731 contained false statements when he signed it, the NRC could still not "hold him accountable for this knowledge because another manager may have had greater responsibility" and that "the NRC could never hold a knowledgeable individual accountable for an inaccurate and incomplete document as long as the individual could [point to] someone with greater responsibility." *Id*. at 23-24.

[125] *See* LBP-09-24, 70 NRC __ (slip op. at 58-59 (citing Tr. 1639-40)).

> [Mr. Geisen:] No. I believed when I signed it I was – I was doing a good review. I don't believe that's the case now, but I believed at the time I was doing a good review.[126]

The majority found Mr. Geisen's testimony credible. The majority observed: "without any evidence directly linking Mr. Geisen to the development of Serial Letter 2731, we cannot reasonably attribute to Mr. Geisen more knowledge than [that of] the engineers, supervisor, and manager directly responsible for the work in question who had all previously signed the Green Sheet."[127]

Given the discussion in the record on this point, we do not find clear error in the majority's observations about how Mr. Geisen viewed his role.

(4) WHETHER MR. GEISEN KNEW HIS STATEMENTS TO THE COMMISSIONERS' TECHNICAL ASSISTANTS WERE INACCURATE

The Staff argues that Mr. Geisen knew that statements made during an October 11, 2001 briefing and slide presentation to the Commissioners' technical assistants were materially inaccurate.[128] The majority found that Mr. Geisen believed he was being truthful when he presented slides indicating that the nozzles had been checked for the popcorn-like deposits and that there was no evidence of leakage.[129] As discussed below, we do not find the majority's ruling clearly erroneous.

According to the stipulated facts, Mr. Geisen and other FENOC managers met with the Commissioners' assistants in October 2001 to present a safety argument for allowing Davis-Besse to continue operations until its next scheduled refueling outage in March 2002.[130] In

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[126] Tr. at 1641-42.

[127] LBP-09-24, 70 NRC__ (slip op. at 59).

[128] Staff Petition at 24-25.

[129] LBP-09-24, 70 NRC__ (slip op. at 103-05).

[130] Stipulated Facts at 4.

attendance were FENOC employees Guy Campbell, Site Vice President of Davis-Besse; Stephen Moffitt, Technical Services Director at Davis-Besse; David Lockwood, FENOC's Director of Regulatory Affairs; and Mr. Geisen.[131] A slide presentation was prepared the night before the meeting by these employees as well as Gerry Wolf, also with FENOC's Regulatory Affairs office, and Ken Byrd, an engineer assigned to manage the creation of the crack-growth model.[132]

At the meeting, Mr. Geisen presented two slides that discussed the results of past inspections.[133] One of these, "Slide 7," stated that all CRDM penetrations were "verified" to be free of the "popcorn" type boron deposits that indicate nozzle cracking.[134] But in actual fact, the nozzles could not be verified to be free of these deposits because massive boron deposits obscured many nozzles.[135]

The majority found that even though Mr. Geisen's statements at the meeting were inaccurate, they were consistent with his "general understanding . . . of the facts at hand."[136] According to the Staff, the majority based this general finding on its underlying findings that when the presentation slides were prepared: "(1) '[o]thers in the room plainly knew more than Mr. Geisen on these matters' and (2) no one contradicted the information Mr. Geisen was using for the slides and presentation."[137]

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[131] LBP-09-24, 70 NRC __ (slip op. at 100).

[132] *Id.* at __ (slip op. at 101 (citing Tr. at 1690-91, 1726)).

[133] Stipulated Facts at 4-5.

[134] *Id.* at 5.

[135] *Id.*

[136] LBP-09-24, 70 NRC __ (slip op. at 104).

[137] Staff Petition at 24 (quoting LBP-09-24, 70 NRC __ (slip op. at 104)).

The Staff disputes the majority's finding that "others in the room were more knowledgeable than Mr. Geisen" when the team met to prepare slides. The Staff argues that this finding is inconsistent with Mr. Geisen's own testimony that "he was the 'scribe' for developing the slides on his laptop and that he believed he put in the information regarding past inspections because he was the most knowledgeable person there about inspections."[138]

But the majority's observation that "others . . . were more knowledgeable" was not about which manager knew the most about "inspections" generally. The majority was concerned about which persons in the room knew most about the true condition of the reactor head.[139] Given the various factors the majority discusses in its lengthy opinion concerning Mr. Geisen's other duties and his reliance on others for accurate information, it was not unreasonable for the majority to find that others knew more than Mr. Geisen about the reactor head's condition.[140]

In addition, the Staff points out that Slide 7 stated that all nozzles "were verified to be free" from boron[141] despite the fact that "Mr. Geisen knew that Davis-Besse had not yet completed this verification because he was responsible for overseeing it."[142] Mr. Geisen testified that, even though he knew that the table Mr. Siemaszko was preparing had not yet been completed, he believed that this verification had been done during the past two inspections:

> [Judge Trikouros:] But did you speak to Mr. Siemaszko? I guess a week earlier you had that telephone call, the assignment was made for nozzle-by-nozzle table development. Did you speak to him at all during the following week that preceded this meeting?

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[138] *Id.* (citing Tr. at 1924-25).

[139] LBP-09-24, 70 NRC __ (slip op. at 104).

[140] *See, e.g., id.* at __ (slip op. at 57-59).

[141] Staff Petition at 24 (quoting Staff Ex. 55, at 7) (available in Staff Exhibits, Part 2, at 170).

[142] *Id.* (citing Tr. at 1720-21, 1925, and Staff Ex. 71, (David Geisen testimony transcript at Geisen criminal trial at 1910) (ML100480730).

> [Mr. Geisen:] He was – I did meet with him prior to this meeting to . . . check his methodology that he was using for doing that . . . nozzle-by-nozzle verification table. I cannot say that I specifically spoke to him about the word-by-word bullet that is in here, that I got it from him. There may have been things that he talked about in the process of describing his technique that I absorbed to create this bullet. But at the time this was delivered, I believed that between 1998 or . . . 2000, we had a good look at each nozzle. And it wasn't until after I got the nozzle table back from Mr. Siemaszko shortly after this presentation, that I realized that we had [spoken] in error. And that's when I brought it to the attention of Mr. Moffitt and Mr. Lockwood.[143]

Mr. Geisen also testified that during the briefing he relied for his information on Serial Letter 2731 – a letter he did not draft – as well as on input from others who participated in developing the slide presentation.[144] He further testified that he never claimed during the meeting that he personally had verified this information.[145]

The Staff also argues that "either Mr. Geisen made up the information or he lied"[146] because he testified that "he used only the information contained in Serial Letter 2731 to create the slides, yet he acknowledged that Serial Letter 2731 contained no information to support those representations."[147] But the transcript portions the Staff cites show only that Mr. Geisen could not identify the precise source of all the information presented in the slides.[148] This is

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[143] Tr. at 1931-32.

[144] *Id.* at 1925-26.

[145] *Id.* at 1927-28.

[146] Staff Petition at 25.

[147] *Id.* at 24-25 (citing Tr. at 925, 1928-29, 1943, 1944).

[148] *See, e.g.*, Tr. at 1925-26:

> [Question:] The only – is it correct to say that the only information you had still at this time was from reading serial letter 2731?
>
> [Mr. Geisen:] That's correct. It may have been also from some side bars with – because there were other people that participated in the development of the slides, so they may have brought stuff to the discussion, as well.

Tr. at 1928-29:
(continued . . .)

consistent with the majority's finding that the information contained in the slides was decided by consensus.[149] The testimony cited by the Staff does not, in our view, establish that Mr. Geisen knew that the information was inaccurate.

The Staff argues that Mr. Geisen knew at the time that the material in the presentation was inaccurate. As discussed above, the Staff relies principally on showing claimed inconsistencies in Mr. Geisen's own testimony at the hearing, but it provides no evidence that Mr. Geisen actually knew at the time of the meeting that the material was inaccurate. The Staff has offered, for example, no evidence from anyone who was present at the FENOC meeting when the slides were prepared to suggest that Mr. Geisen was told that the information to be presented was inaccurate. In short, at the hearing the Staff needed to convince the Board that either the attendees of the preparatory meeting concurred in the deception, or that Mr. Geisen

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> [Question:] . . . Now, would you please direct our attention to where it says [in Serial Letter 2731] that all of the nozzle penetrations were verified to be free of popcorn deposits?
>
> [Mr. Geisen:] It doesn't use those exact words in there.
>
> [Question:] And what words did you rely on?
>
> [Mr. Geisen:] . . . I took the information that was in 2731, call it absorbed, became my frame of reference, and from that frame of reference made the statement . . .
>
> [Question:] Well, can you show us what words gave you that information?
>
> [Mr. Geisen:] The fact that the review was conducted to reconfirm that indications of boron leakage at Davis-Besse nuclear power station were not similar to those indications seen at ONS and ANO-I. That's in the bullet for subsequent review of 1998 and 2000 inspection video tapes.

Tr. at 1943:

> [Judge Trikouros:] And the source of that information is not clear to you at all.
>
> [Mr. Geisen:] I believe the majority of that information came from my understanding of 2731.

[149] LBP-09-24, 70 NRC __ (slip op. at 101) ("[E]ach of these individuals [at the preparatory meeting] agreed with the accuracy of the information in all of the Powerpoint slides.").

knew of the inaccuracy and kept it to himself. But the transcript portions the Staff cites, discussed above, contain no information to support either argument.

The majority also found it significant that Mr. Geisen immediately alerted his management that the information presented to the Commissioners' assistants had been in error upon reviewing Mr. Siemaszko's nozzle-by-nozzle table completed shortly after the meeting.[150] Mr. Geisen testified at the hearing, and Stephen Moffitt testified at the criminal trial, to this effect.[151] That Mr. Geisen immediately took steps to alert others of the errors indicated to the majority that he was not aware that the information presented to the Commissioners' assistants was inaccurate when he presented it at the meeting days earlier. We agree with the Board majority that Mr. Geisen's prompt reporting of the contradictory information implies a lack of knowledge beforehand.

As with many of the facts surrounding how the situation unfolded at Davis-Besse, the question how Mr. Geisen came to prepare the slides and give the presentation to the Commissioners' technical assistants is complicated by the number of individuals involved and the large volume of testimony – much of it re-plowing the same ground. On the one hand, the Staff cites portions of Mr. Geisen's testimony where he avers that he generally was knowledgeable about the conditions at the plant. On the other, the majority credits his straightforward statements that he relied on others to provide accurate information in creating the slides that would be presented. At most, the Staff's arguments suggest that the majority could have received Mr. Geisen's statements with greater skepticism. Based on the record, the Board might well have determined that Mr. Geisen's testimony was not credible and ruled in

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[150] *Id.* at __ (slip op. at 101-02, 104).

[151] Tr. at 1721, 1931-32, 1946-47; Transcript of Trial, *United States v. Geisen*, Docket No. 3:06-CR-712 (N.D. Ohio) (Oct. 11, 2007), Tr. Vol. 7, at unnumbered p. 92 (ML092920148).

favor of the Staff. But this possible alternative resolution of the case does not equate to finding no evidence in the record supporting the majority's view.

In the end, the majority weighed the evidence and, overall, found Mr. Geisen's version of events and of his own state of mind credible. Given that this finding of fact turns largely on Mr. Geisen's credibility as a witness, we see no clear error in the majority's ruling.

c. Conclusion

That the majority gave greater weight to Mr. Geisen's evidence than to the Staff's evidence is not a basis for overturning the majority's findings of fact. Such weighing of evidence and testimony is inherent in, and at the very heart of, adjudicatory fact-finding – an area where we have traditionally deferred to our licensing boards.[152] Regardless of whether we would have made the same findings as the majority were we in its position,[153] we recognize here that the majority's factual analysis and findings are detailed, thorough, internally consistent, and supported by record evidence. Further, the Board had the significant advantage, unavailable to us, of observing the witnesses firsthand and judging their demeanor and credibility. For these reasons, we decline to overturn the Board majority's findings of fact.

3. Legal Challenges

Our reviews of boards' legal conclusions are more searching than our reviews of their findings of fact. We review legal questions *de novo,* and will reverse a board's legal conclusions if they depart from or are contrary to established law.[154]

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[152] *See*, *e.g.*, *AmerGen Energy Co., L.L.C.* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

[153] *See Watts Bar*, CLI-04-24, 60 NRC at 189 ("'We will not overturn a hearing judge's findings simply because we might have reached a different result.'") (quoting *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93-94 (1998) (in turn quoting *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987))).

[154] *See id.* at 190.

a. The Weight the Majority Assigned to Circumstantial Evidence

The Staff criticizes the majority for affording "more weight to the absence of certain pieces of direct evidence than to the totality of circumstantial evidence."[155] For instance, the Staff asserts that the majority gave more weight to the Staff's decision not to put on any witnesses to incriminate Mr. Geisen than to the cumulative weight of direct and circumstantial evidence that, in the majority's view, illustrated Mr. Geisen's actual knowledge that his statements were false.[156] The Staff points out that it is permitted to prove its case using either direct or circumstantial evidence and that the two carry equal probative value.[157] According to the Staff, the majority's balancing contravenes established evidentiary law and therefore requires a reversal.

As with its argument regarding the so-called "Five-Factor Test," discussed above, the Staff here dresses up a factual argument as a legal one. The majority weighed and balanced numerous factors in reaching its factual findings. In that process, it necessarily determined how much weight to give the circumstantial evidence upon which the Staff relied. The fact that the majority assigned less weight to such evidence than the Staff would prefer does not mean that the majority made a legal determination that all (or even some) circumstantial evidence must be ignored *because* of its circumstantial nature. Had the Board actually made *that* determination, it would have committed legal error for the reasons set forth by the Staff. Yet we see nothing in

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[155] Staff Petition at 9 (citing LBP-09-24, 70 NRC __ (slip op. at 28, 63 n.112, 131-32), and citing favorably Judge Hawkens's dissent, LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 57 n.43)).

[156] *Id.* (citing 70 NRC __ (slip op. at 27-28 and 132 (discussing the significance of lack of direct testimonial evidence))). *See also id.* at 10 n.26 (citing LBP-09-24, 70 NRC __ (slip op. at 132-33), and LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 57 n.43)).

[157] *Id.* at 9-10 (citing *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence."); *Doe v. U.S. Postal Serv.*, 317 F.3d 339, 343 (D.C. Cir. 2003) (the court "draw[s] no distinction between the probative value of direct and circumstantial evidence")).

the majority's decision to suggest that it did so.[158] And absent such a legal determination, the degree of consideration the Board paid to the Staff's circumstantial evidence falls squarely within the bounds of a factual finding related to weighing evidence. We therefore defer to the majority, just as we did in the preceding section of today's decision, where we examined the Staff's challenges to the majority's findings of fact but found no clear error.

b. Majority's Improper Reliance on "Sanctions" Evidence in "Violation" Determination

On the final day of the five-day evidentiary hearing, when the Board was considering the appropriateness of the Enforcement Order's penalty,[159] Mr. Geisen offered into evidence the NRC Office of the Inspector General's 2004 Semiannual Report to Congress.[160] The OIG Report addressed, among many other things, the adequacy of the Staff's response to the corrosion problem at Davis-Besse during 2001 and 2002.[161] As relevant here, it stated that "[t]he Davis-Besse Senior Resident Inspector and the Resident Inspector and possibly a Region III based inspector" had seen a FENOC Condition Report,[162] which included a so-called "Red

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[158] Indeed, the majority explicitly stated that it did "not dispute that circumstantial evidence can be compelling." LBP-09-24, 70 NRC __ (slip op. at 132). Elsewhere, it raised the question whether "the quality of circumstantial evidence [was] sufficient to give rise to a finding that the person charged actually knew the information" – a question that would have been irrelevant to the Board had it determined to ignore all of the Staff's circumstantial evidence. *Id.* at __ (slip op. at 31). And finally, the Board actually complimented the Staff for its "commendable effort [in] drawing upon an abundance of circumstantial evidence [to] support[] the underlying charges of the Enforcement Order." *Id.* at __ (slip op. at 134).

[159] The Board devoted the first four days of the enforcement hearing to the violation issue, and the final day (Friday, December 12, 2008) to the sanctions/penalty issue. *See* Tr. at 793-2004 (violation), 2005-2342 (sanctions); Staff Petition at 10 n.28.

[160] Geisen Ex. 27, NUREG 1415, Vol. 16, No. 2, "[NRC] Office of the Inspector General Semiannual Report to Congress" (Apr. 2004) (ML092610792) (OIG Report). *See* Tr. at 2202-03 (submitted), 2296-2302 (admitted into evidence).

[161] OIG Report at 12.

[162] Staff Ex. 19, Condition Report 2000-0782 (Apr. 6, 2000) (available in Staff Exhibits, Part 1 at 364). Condition Report 2000-0782 was prepared by a Davis-Besse engineer in April 2000 at the beginning of Davis-Besse RFO 12. *See* OIG Report at 12.

Photo,"[163] but that they had failed to recognize "the significance of the boric acid corrosion."[164] The OIG Report's focus was the actions of the NRC staff and not the actions of the licensee or its employees.

Mr. Geisen introduced the OIG Report in an apparent effort to rebut the Staff's claim that he must have known of the significance of the corrosion, yet did not inform the NRC.[165] We understand that Mr. Geisen introduced the report to show that the NRC inspectors' own failure to appreciate the significance of the corrosion lends credence to his own claim that he merely had failed to recognize this significance rather than that he intentionally had hidden that significance from the NRC.[166] In addition, Mr. Geisen argued that the OIG Report draws into question the integrity of the fact-finding investigation that led up to the Enforcement Order.[167]

The Staff objected at the hearing to the Board's consideration of the OIG Report, arguing that it concerned the Staff's rather than Mr. Geisen's knowledge and performance, and was therefore irrelevant to the enforcement proceeding, where only Mr. Geisen's knowledge and

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[163] The "Red Photo" was a "photograph of the reactor vessel head prior to the cleaning, that showed what Mr. Geisen believed to be flange leakage flowing in a lava-like fashion from some mouseholes at the bottom of the reactor vessel head." LBP-09-24, 70 NRC ___ (slip op. at 63 (citing Tr. at 1569)).

[164] OIG Report at 12.

[165] *See* Tr. at 2206-07. *See also id*. at 1289 (Dr. Hiser: "[The Red Photo] should tell almost any engineer that there is a significant problem there at Davis-Besse."), 1292 (Dr. Hiser: "I would hope that [the photo's significance would be] fairly obvious to pretty much all engineers.").

[166] *Post-trial Brief of David Geisen with Proposed Findings of Fact and Conclusions of Law*, at 45 (Jan. 30, 2009) ("No one explained how the Red Photo which was given to the Resident Inspector and made no impression on him was somehow to make a greater impression on everybody at Davis-Besse who saw it.").

[167] Tr. at 2208 (Mr. Geisen's counsel to Staff witness Mr. O'Brien: "Did you take into consideration the findings of the OIG into what you decided about the credibility and integrity of the information you were considering and on the sanctions that you ultimately imposed on Mr. Geisen?"), 2297-98 (Mr. Geisen's counsel).

actions were at issue.[168] The Board assured the Staff that it would not rely on the OIG Report when deciding whether to find Mr. Geisen in violation of the NRC's regulations.[169] Specifically, the Board promised that its "decision on Mr. Geisen's liability [would be] based on the evidence [it] heard from Monday through Thursday," during the "violation" phase of the hearing,[170] and not evidence received on Friday, December 12, 2008, during the "sanctions" phase. But when the majority issued LBP-09-24, it overlooked this commitment. Relying specifically on the Report's statement that NRC inspectors had not recognized the significance of the Condition Report and the "Red Photo" as it related to possible boric acid corrosion, the majority concluded that "we cannot fairly infer that Mr. Geisen must have known of its ramifications, when others did not."[171]

On appeal, the Staff argues that the majority committed prejudicial procedural error by relying upon the OIG Report's statement. The Staff complains that it relied upon the Board's assurances and therefore presented no rebuttal evidence on the matter insofar as the statements in the OIG Report related to Mr. Geisen's asserted regulatory violation.[172] The Staff claims that, absent such assurances from the Board, it "would have sought to rebut such evidence when it was submitted."[173]

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[168] *Id*. at 2204 (Staff counsel: "I have to object. This is completely immaterial, what the . . . OIG investigated about conduct of the Staff."), 2296 (Staff counsel: "I would question the relevance of it.").

[169] *Id*. at 2157-59.

[170] *Id*. at 2157 (Judge Farrar). *See also id*. at 2158-59 (Judge Farrar: "if Mr. O'Brien said, 'Now that I think about it, I don't think he's guilty,' we might still find him guilty *based on the evidence we heard from you from Monday through Thursday*." (emphasis added)).

[171] LBP-09-24, 70 NRC __ (slip op. at 64) (emphasis omitted). *See also id.* at __ (slip op. at 65) ("[I]t is a fact that at least one key Staff official was no better at diagnosing the disastrous potential of what was seen than was Mr. Geisen. . . . We are unwilling to impute to Mr. Geisen knowledge that the Staff was unable to derive for itself . . . .") (emphasis omitted).

[172] Staff Petition at 10-11.

[173] *Id.* at 11.

We agree with the Staff that the Board erred. Mr. Geisen submitted the OIG Report into evidence during the "sanctions" portion of the hearing. When admitting the report into evidence, the Board committed not to consider it when determining whether to sustain the Staff's finding of violation. Yet the majority did take the OIG Report into account when making that determination. Consequently, we find that the majority either should not have considered the OIG Report when determining whether Mr. Geisen had violated our regulations or should have given the Staff an opportunity to present rebuttal evidence.[174]

But to prevail on appeal, the Staff must show not only that the majority erred but also that the error had a prejudicial effect on the Staff's case.[175] Despite acknowledging this burden of proof in its petition for review,[176] the Staff articulated no explanation of how it had been prejudiced by the majority's reliance upon the OIG Report. Indeed, the Staff's only mention of prejudice in this context is one conclusory sentence in its petition for review: "[b]y inappropriately allowing the [OIG] Report to be introduced for the purpose of determining liability, despite the Board's statements to the contrary, the Staff was prejudicially harmed by the Majority's action."[177]

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[174] It appears the Board invited the Staff to brief the issue of the OIG Report's admissibility (Tr. at 2299 (Judge Hawkens), 2301 (Judge Farrar)), but that the Staff did not take advantage of this opportunity.

[175] *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 n.28 (1985) ("We expect parties taking appeals on purely procedural points to explain precisely what injury to them was occasioned by the asserted error." (citation omitted)); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984) ("[A] mere demonstration that the Board erred is not sufficient to warrant appellate relief. 'The complaining party must demonstrate actual prejudice – *i.e.*, that the ruling had a substantial effect on the outcome of the proceeding.'" (quoting *Louisiana Power and Light Co.* (Waterford Steam Electric Station), ALAB-732, 17 NRC 1076, 1096 (1983))).

[176] Staff Petition at 3 n.8.

[177] *Id.* at 11. We repeatedly have stated that we will not consider cursory, unsupported arguments. *See*, *e.g.*, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002); *Northeast Nuclear Energy Co.* (Millstone Nuclear (continued . . .)

Had the Staff submitted an offer of proof to us, indicating what rebuttal evidence it would have offered to the Board, then we might have some basis for determining whether that evidence would be substantial enough to justify a remand to the Board.[178] But the Staff provides us no offer of proof.[179] We therefore find ourselves in the same situation as the Appeal Board in *Pilgrim* a quarter-century ago: "[f]or all we know, [the appealing party's] case . . . is so weak that . . . the denial of [a] right [to reply] by the Licensing Board would have been harmless error."[180]

Indeed, our review of the adjudicatory record in this proceeding suggests that the majority's consideration of the OIG Report had little to do with its conclusion that Mr. Geisen did not violate section 50.5(a)(2). It appears the majority did not consider the "Red Photo" to be the "smoking gun" that the Staff considered it to be. As an initial matter, the majority found credible Mr. Geisen's testimony that, when he saw the Red Photo during the 2000 refueling outage (RFO 12), "it did not create any alarm or strike him as a warning that any pressure boundary

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Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 204 n.6 (2000).

[178] *See generally Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-255, 1 NRC 3, 7 (1975).

[179] From the argument at hearing, we could infer that the Staff would have attempted to show that no NRC inspector saw the Red Photo before the corrosion was discovered in March 2002. *See* Tr. at 1292 (Staff counsel: "Your Honor, just for clarification, there is nothing in the record, at least so far, that indicates that a resident inspector saw this photo or received it or anything of that nature"). *See also id*. at 2297 (Staff counsel) ("Mr. Simpkins [a resident inspector at Davis-Besse] actually testified in Mr. Siemaszko's criminal trial . . . several times that to the best of his recollection he had never – he didn't receive the red photo. . . . Mr. Simpkins testified that he doesn't recall ever seeing the red photo during the period in question.").

[180] *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 n.28 (1985) (citation omitted). The Appeal Board in *Shoreham* also specifically pointed to the intervenor's failure to make an "offer of proof in connection with any affirmative expert testimony it would have put forward." *Shoreham*, ALAB-788, 20 NRC at 1155-56. *Compare Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 49 (1984), where the Appeal Board ruled that a Licensing Board had erred in holding it lacked authority to consider contentions based on recent revisions to a license application, but that the error was harmless because the intervenor had never submitted any contentions on the revisions.

leakage issue existed."[181] Further, the majority found that even if Mr. Geisen had realized, when he saw the Red Photo, that it indicated a serious problem with the reactor head, he would not necessarily have connected that photo with the information in the Bulletin response he was asked to review:

> even if Mr. Geisen had recalled the Red Photo as alerting him to the condition of the reactor vessel head from the 2000 outage, the information in Serial Letter 2731 does not on its face appear to contrast so significantly with that knowledge that it would catch the attention of one whose role in that letter was so minimal. Mr. Geisen is not being charged with failing to identify a corrosion issue as illustrated in the Red Photo. He is charged with deliberately providing incomplete and inaccurate information by signing the Green Sheet review for Serial Letter 2731.[182]

The majority cited the OIG Report's statement that an NRC inspector or inspectors saw the photo "not to suggest [a] dereliction of duty" by the NRC staff but to show that the photo may seem more significant with the benefit of "hindsight."[183] It does not appear that the majority placed a great deal of weight on an implicit comparison of the NRC inspectors' reactions with Mr. Geisen's reaction to the photo. As we read the majority's decision, its reliance upon the OIG Report was cumulative at most; it merely supplemented many other reasons for the majority's decision regarding the violation, and had no direct bearing on the question whether Mr. Geisen violated our regulations, as specified in the Enforcement Order. The OIG Report, in short, did not have "a substantial effect on the outcome of the proceeding."[184]

In sum, while the Board indeed erred in considering the OIG Report without permitting the Staff to offer rebuttal evidence, the Staff has failed to show that this mistake worked to its disadvantage. The record does not show that the Board majority might have reached a different

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[181] LBP-09-24, 70 NRC __ (slip op. at 64 (citing Tr. at 1570)).

[182] *Id.* at __ (slip op. at 65) (emphasis in original).

[183] *Id.* at __ (slip op. at 64).

[184] *Shoreham*, ALAB-788, 20 NRC at 1151.

result had it handled the OIG Report properly. We therefore conclude that the Board's action amounts to harmless error.

c. The Majority's Decision Not to Apply Collateral Estoppel

On appeal, the Staff challenges the majority's refusal to apply collateral estoppel to establish Mr. Geisen's culpability with respect to one of the communications that formed the basis of both his criminal conviction and the Enforcement Order.

The parallel criminal prosecution against Mr. Geisen charged him with five counts of submitting materially false information to the government relating to the events at Davis-Besse, in violation of Title 18 of the U.S. Code. Mr. Geisen was convicted on counts 1, 3, and 4 of the criminal indictment.

Count 4 of the criminal indictment dealt exclusively with representations in Serial Letter 2744, which was among the last communications from FENOC to the NRC relating to the Bulletin, sent on October 30, 2001.[185] While the letter was intended to correct misinformation sent in FENOC's earlier responses to Bulletin 2001-01, information in the letter was still inaccurate and misleading.[186] Count 4 of the criminal indictment listed six different aspects in which Serial Letter 2744 was misleading, including (as relevant here): overstating the number of nozzles capable of being viewed in past inspections, and stating that photos attached to the letter, which showed relatively little boron accumulation, were representative of the head's

[185] Counts 1 and 3 pertained to alleged misrepresentations in Serial Letter 2741, which was not mentioned in the Enforcement Order. Mr. Geisen has appealed his conviction. *See supra* note 24.

[186] For example, while Serial Letter 2744 acknowledged that many nozzles could not be seen due to boron accumulation during the 1998 and 2000 inspections, it understated the number of nozzles that could not be seen. In addition, Serial Letter 2744 stated that 65 of 69 nozzles were viewed in the 1996 inspection, although fewer nozzles could be viewed at that time. *See* Stipulated Facts at 8-9.

condition when in fact they were not.[187] The jury returned a general verdict of "guilty" on Count 4.

Prior to the evidentiary hearing, the Staff moved for the Board to apply the collateral estoppel doctrine to the issue of whether Mr. Geisen knew that Serial Letter 2744 contained materially false information when he concurred in its release.[188] The Staff reasoned that, if the Board applied collateral estoppel to issues decided in the criminal proceeding, Mr. Geisen would be prevented from raising the defense that he did not know Serial Letter 2744 was false and misleading when he approved it.

Because the Enforcement Order referred to more asserted misrepresentations than those in Serial Letter 2744, however, applying collateral estoppel would not eliminate the need for a hearing entirely, but only limit its scope. The Board therefore declined to rule on collateral estoppel before the hearing in order to avoid possible "inefficiencies and delays . . . as counsel sparred over whether particular pieces of evidence were barred by that scope ruling."[189]

In its merits decision, the majority rejected the Staff's motion to apply collateral estoppel, and chose to evaluate for itself whether the Staff had proved that Mr. Geisen knowingly provided false and misleading information with respect to all of the communications referenced in the Enforcement Order, including those associated with Serial Letter 2744. The majority stated that even if all the necessary elements of collateral estoppel were present (on which it made no express finding), discretionary factors weighed strongly in favor of rejecting its use in this proceeding.[190]

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[187] Indictment at 13.

[188] *NRC Staff Motion for Collateral Estoppel* (Nov. 17, 2008) (Motion for Collateral Estoppel).

[189] LBP-09-24, 70 NRC __ (slip op. at 35).

[190] *Id.* at __ (slip op. at 36-53).

Judge Hawkens, however, found that all the necessary elements of collateral estoppel were met as to Serial Letter 2744.[191] Further, Judge Hawkens argued that there is a "compelling public interest" in preserving public faith in the adjudicatory process by avoiding inconsistent results, and concluded that this must outweigh any "private interest" Mr. Geisen might have in relitigating the issue of whether he knowingly made material false statements to the government.[192]

Fundamentally, the majority questioned whether the prerequisites of collateral estoppel were met as to the findings regarding Serial Letter 2744 in this proceeding, because the general jury verdict prevented the Board from knowing whether the issue sought to be precluded was identical to the issue decided in the criminal action. Without overtly addressing the requirements of collateral estoppel, the majority essentially determined that those requirements were not met. The majority concluded that unless the Board was certain that the issue decided in the criminal proceeding was identical to the issue before the Board – specifically, whether Mr. Geisen actually knew at the time that the information he provided to the NRC in Serial Letter 2744 was false and misleading – it could not apply the doctrine in this proceeding. The majority's decision not to apply collateral estoppel in this instance was not in error.

(1) THE COLLATERAL ESTOPPEL DOCTRINE

As Judge Hawkens stated, the collateral estoppel doctrine "'precludes the re-litigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies.'"[193] Its use has long been recognized

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[191] *Id.* at __ (slip op., Dissenting Opinion at 5-7).

[192] *Id*. at __ (slip op., Dissenting Opinion at 19-20).

[193] *Id.* at __ (slip op., Dissenting Opinion at 2 (quoting *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557, 561 (1977))).

as part of NRC adjudicatory practice.[194] Decades ago, our Appeal Board recognized that our boards may give collateral estoppel effect to issues previously decided in a district court proceeding.[195] The four prerequisites to collateral estoppel are: "'(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated'" in the prior action; (3) there is a valid and final judgment in the prior action; and "'(4) the determination [was] essential to the prior judgment.'"[196] In addition, the party to be prevented from relitigating the issue must have been a party to the prior action; the party seeking to prevent relitigation through the application of collateral estoppel need not have been a party.[197]

Mr. Geisen argued before the Board, as he does on appeal, that the first requirement of this test was not met.[198] Resolving that question turns on whether the issues decided regarding Mr. Geisen's participation in preparing and submitting to the NRC Serial Letter 2744 were identical in the criminal and NRC proceedings. Whether collateral estoppel should be applied is a legal question that we review *de novo*.[199]

(2) MAJORITY DECISION TO REJECT COLLATERAL ESTOPPEL

The majority gave three "discretionary" reasons for its decision to reject collateral estoppel, each of which, standing alone, would provide sufficient grounds for doing so,

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[194] *See*, *e.g.*, *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982).

[195] *Davis-Besse*, ALAB-378, 5 NRC at 562-63.

[196] LBP-09-24, 70 NRC __ (slip op. at 35-36 (quoting *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd*, ALAB-575, 11 NRC 14 (1980))).

[197] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28, 331-32 (1979).

[198] *See* Geisen Answer at 17-24. He does not contest that the other requirements were satisfied.

[199] *See Watts Bar*, CLI-04-24, 60 NRC at 190.

according to the majority.[200] The first – which we find dispositive – is that due to a specific instruction given to the jury in the criminal trial, the criminal conviction may have been based on a standard of "knowledge" different from that used in our proceeding (and in our Enforcement Policy).[201] Coupled with the jury's general – as opposed to special – verdict, the majority ruled that it could not be certain whether the knowledge standards were the same in both proceedings.

We uphold the majority's decision. Count 4 of the criminal indictment charged that Mr. Geisen "did knowingly and willfully make, use, and cause others to make and use a false writing . . . knowing that it contained the following material statements, which were fraudulent in [enumerated respects]."[202] In its charge to the jury, however, the court included an instruction that a person cannot "avoid responsibility for a crime by deliberately ignoring the obvious,"[203] and that, if Mr. Geisen "deliberately ignored a high probability that the submissions and presentations to the NRC" were false, then the jury could find that Mr. Geisen "knew" they were false.[204] The court advised the jury that conviction on this theory requires that a defendant

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[200] LBP-09-24, 70 NRC __ (slip op. at 53).

[201] *Id.* at __ (slip op. at 40, 48-50). The majority also found that application of the doctrine, instead of streamlining the proceeding, would actually lead to an additional delay before the enforcement proceeding finally could be resolved. Because Mr. Geisen would remain under an employment ban until that time, the burden of the delay would fall disproportionately on him, the majority observed. *Id.* at __ (slip op. at 37-39). Finally, the majority found that potentially inconsistent jury verdicts undermined the validity of the conviction on Count 4. *Id.* at __ (slip op. at 51-53). We find that we need not consider these final two rationales, because the first provides sufficient grounds for the majority's decision to reject use of the doctrine.

[202] Indictment at 12.

[203] Transcript of Trial, *U.S. v. Geisen*, Docket No. 3:06-CR-712 (N.D. Ohio Oct. 23, 2007) Vol. 13, at unnumbered p. 139 (ML092920145).

[204] *Id*.

"deliberately closed his eyes to what was obvious," but that mere "carelessness, or negligence, or foolishness" would not be enough to convict.[205]

Mr. Geisen argued before the Board that this jury charge embraced a "deliberate ignorance" (or "willful blindness") theory,[206] which holds that a defendant can be convicted if he was aware that a "high probability" existed of the fact or circumstances that would make his conduct criminal, but ignored that probability so he can disclaim knowledge later.[207] The majority agreed that the instruction to the jury introduced the possibility of a conviction on a deliberate ignorance theory.[208]

The distinction between the court's "deliberate ignorance" standard and the "deliberate misconduct" standard applied in this case is highly significant, indeed, decisive. The Staff, when moving for collateral estoppel, itself *conceded* that "the 6th Circuit's deliberate ignorance instruction does not meet the NRC's deliberate misconduct standard, and instead would be classified as careless disregard."[209] On appeal, the Staff does not change its position.[210] It does not argue that the court's "deliberate ignorance" charge equates to the "deliberate misconduct" standard under our Enforcement Policy.

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[205] *Id*. at unnumbered p. 140.

[206] *See*, *e.g.*, *David Geisen's Response to the Board's Questions* (Feb. 9, 2009) at 1.

[207] *See, e.g., United States v. Jewell*, 532 F.2d 697, 699 (9th Cir. 1976) (drug smuggling conviction upheld where evidence showed that "although appellant knew of the presence of the secret compartment and had knowledge of facts indicating that it contained marijuana, he deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery"); *United States v. Wasserson*, 418 F.3d 225, 237-39 (3d Cir. 2005) (unlawful disposal conviction upheld where defendant knew contractor could not lawfully dispose of hazardous waste at the price defendant was paying, but defendant demanded that unsophisticated contractor "assume responsibility" for the waste).

[208] LBP-09-24, 70 NRC __ (slip op. at 40).

[209] Motion for Collateral Estoppel at 23.

[210] *See generally* Staff Petition at 13-14 (focusing instead on its argument that jury convicted Mr. Geisen based on "actual, positive knowledge").

The majority treated this issue as a discretionary factor weighing against collateral estoppel because it could not be sure on which legal theory the jury convicted Mr. Geisen.[211] In essence, however, the majority found that a key legal requirement for collateral estoppel was not met. If the criminal conviction were in fact based on a standard of knowledge lower than that of our deliberate misconduct standard, then the first requirement of collateral estoppel – that the relevant issue is identical in both proceedings – would not be met. In other words, if the jury convicted Mr. Geisen not because he knew the information in Serial Letter 2744 was false, but because he failed to investigate whether the information in the letter was false, then collateral estoppel could not apply. On the other hand, if the jury convicted Mr. Geisen because they found he *actually knew* the information was false, then the "identity of issues" requirement of collateral estoppel would be satisfied. The majority found, however, that because the jury returned a general verdict of "guilty" on Count 4, the majority could not determine on which theory Mr. Geisen was convicted.

As to this issue, the Staff argues that the majority improperly substituted its determination of fact for that of the jury by finding insufficient evidence of "deliberate ignorance" and actual knowledge.[212] Among other things, the Staff argues that the "questions over the equivalence of the 'knowledge' standard" is not the type of consideration that would bar the application of collateral estoppel.[213] We disagree and find that uncertainty resulting from the jury instruction, coupled with the general verdict, was reason enough for the Board to reject use of the doctrine in this case.

The Staff argued before the Board, as it does on appeal, that the Board could look at the evidence presented in the jury trial to determine itself on which theory the jury based its

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[211] LBP-09-24, 70 NRC __ (slip op. at 40).

[212] Staff Petition at 13.

[213] *Id.* at 12-13.

conviction.[214] The majority regarded the Staff's argument as an invitation for the Board to examine the evidence presented at the criminal trial and make a judgment as to which theory the jury used to convict Mr. Geisen.[215] But, as the majority observed, "[p]erforming 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."[216]

As our Appeal Board once cautioned, in determining whether to apply collateral estoppel, a board should not look into the jury trial to determine whether the verdict was "correct."[217] Issues not decided by special verdict are difficult to decipher for collateral estoppel purposes because of the uncertainty whether the precise issue was "actually determined" in the prior criminal case.[218] This uncertainty is reason enough to find that the issue decided by the general verdict should not be accorded preclusive effect.[219]

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[214] Motion for Collateral Estoppel at 3, 11-12. *See also* Staff Petition at 14.

[215] *See* LBP-09-24, 70 NRC __ (slip op. at 48-50).

[216] *Id*. at __ (slip op. at 50).

[217] *Davis-Besse*, ALAB-378, 5 NRC at 562-63. *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 182 (2002) ("The correctness of the prior decision is not . . . a public policy factor upon which the application of the doctrine of collateral estoppel depends.").

[218] *Cf. Bd. of County Supervisors v. Scottish & York Ins. Servs*., 763 F.2d 176, 179 (4th Cir. 1985) ("We cannot distill special findings from a general verdict and to do so would intrude on the independent role of a jury as much as would a court's unilateral amendment of its verdict.").

[219] Nothing in the recent decision by the U.S. Court of Appeals for the Sixth Circuit affirming Mr. Geisen's conviction resolves the uncertainty. Notwithstanding the Sixth Circuit's decision, it remains unclear whether the jury (in issuing its general verdict) and the Licensing Board (in assessing the enforcement action) applied the same standard of knowledge. The Sixth Circuit's holding that the jury *could* have convicted Mr. Geisen under *either* a "deliberate ignorance" *or* an "actual knowledge" theory does not tell us what the jury *actually* found – the court's decision, therefore, does not resolve the Board majority's fundamental uncertainty. *United States v. Geisen*, 2010 WL 2774237 at *12-14, *16-18. The Sixth Circuit's affirmance of a jury verdict against Mr. Geisen – which may well have rested on a deliberate ignorance theory inapplicable (continued . . .)

The Staff also argues that the majority erroneously assumed that the jury "failed to follow the district court's instructions" in delivering the guilty verdict.[220] It is true that at two separate points in its discussion on the matter, the majority speculates that the jury may have been misled by the "deliberate ignorance" instruction to convict on a lesser finding of negligence.[221] But it does not appear to us that the majority *assumed* that the jury did so. The majority rejected collateral estoppel because a proper finding of guilt based on deliberate ignorance – in strict compliance with the jury instruction – would not equate to deliberate misconduct under our Enforcement Policy.[222] Coupled with the Staff's consistent position that "deliberate ignorance" is not the equivalent of deliberate misconduct in our enforcement proceedings, the majority found that the jury may have convicted Mr. Geisen on a theory that is not the same as that required to establish liability in our enforcement actions.

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in our proceeding – does not require setting aside our own Board's record-based factual findings.

It may seem counterintuitive for us to uphold a Board decision in favor of Mr. Geisen on essentially the same facts the Sixth Circuit found sufficient to convict him, particularly because our civil proceeding is governed by a preponderance-of-the-evidence standard, whereas the criminal case before the Sixth Circuit was governed by the stricter beyond-a-reasonable-doubt standard. Even so, these seemingly contradictory results do not justify applying collateral estoppel in this instance. The Board majority reasonably found itself unsure of the precise ground for the jury verdict, and thus declined to apply collateral estoppel. The Board held its own evidentiary hearing, developed its own record, and made its own fact findings – the Board majority, unlike the dissent, found Mr. Geisen's version of events credible. We cannot say that the Board decision not to apply the collateral estoppel doctrine here was unreasonable based on an after-the-fact appellate decision whose precise footing remains uncertain. In any case, the nature of this proceeding has generated interest in further exploring the standard of knowledge required for pursuing violations against individuals for deliberate misconduct. Therefore, outside of this adjudication, we intend to direct the Staff to analyze this issue.

[220] Staff Petition at 13-14.

[221] *See* LBP-09-24, 70 NRC __ (slip op. at 46, 49).

[222] *See id*. at __ (slip op. at 49).

Responding to an argument made by Judge Hawkens that deliberate ignorance would satisfy our Enforcement Policy,[223] the majority stated that because the Staff had steadfastly "disavowed" this position before and throughout the hearing, it would be unfair for the Board to alter the theory of the Staff's case.[224] Mr. Geisen had tailored his presentations to counter the Staff's case as prosecuted, the majority reasoned. Indeed, the Staff does not argue on appeal that "deliberate ignorance" is equivalent to "deliberate misconduct" under our Enforcement Policy. In our view, the majority's determination was reasonable.

The majority mentioned two additional reasons supporting its decision not to apply collateral estoppel. First, the majority found that the delay caused by Mr. Geisen's appeal of his criminal conviction, which was still pending at the time, served as a second discretionary reason not to apply collateral estoppel in this particular enforcement action.[225] In addition, the majority articulated its concern that the validity of the jury's verdict was undermined by a potential inconsistency.[226] We need address neither of these factors, as we find that the potentially differing standards of "knowledge" in the criminal and civil proceedings was a dispositive basis for declining to accord preclusive effect to the jury verdict on Count 4.

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[223] Judge Hawkens concluded in his Dissenting Opinion that, despite any Staff concessions to the contrary, deliberate ignorance is a standard of knowledge that satisfies our Enforcement Policy. *See id.* at __ (slip op., Dissenting Opinion at 10-16). Therefore, he found that the elements of collateral estoppel were met regardless of the jury's theory. Further, he concluded that the possibility that the jury's verdict was grounded on this theory provides no discretionary basis against applying the doctrine. *Id.* at __ (slip op., Dissenting Opinion at 20). Rather, Judge Hawkens took the position that the Board should disregard the Staff's concession that deliberate ignorance would not satisfy our Enforcement Policy. He reasoned that a "surpassing public interest favors applying collateral estoppel, and no countervailing interest militates against its application." *Id.*

[224] *See id.* at __ (slip op. at 43). *See also id*. at __ (slip op. at 42 nn.76-77).

[225] *Id.* at __ (slip op. at 37-39).

[226] *Id.* at __ (slip op. at 51-53). Although Mr. Geisen was convicted on Count 4, the jury acquitted him of Count 5, which involved Serial Letter 2745 – a communication submitted to the NRC two days after Serial Letter 2744 containing similar misrepresentations. *See* Indictment at 14.

III. CONCLUSION

For the reasons discussed above, we *grant* the Staff's petition for review, and *affirm* the majority's decision in LBP-09-24.[227]

IT IS SO ORDERED.

For the Commission

[NRC Seal]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of August, 2010.

[227] Given that today's decision affirms the Board majority's decision to set aside the Enforcement Order, we need not address the Staff's final argument on appeal as to whether the majority correctly assessed the Staff's application of Factor 7 of the sanction determination process in our Enforcement Policy.

Chairman Jaczko, respectfully concurring in part and dissenting in part:

I join with my colleagues in large part on this Order. I differ only in that I was more persuaded by the dissent's analysis of the collateral estoppel issue. But as the Commission's Order points out, the collateral estoppel issue would have only resolved one of the bases for the enforcement order in this case, and thus would not have eliminated the need for the hearing in its entirety. Mr. Geisen was subject to the enforcement order for almost four years. Even if collateral estoppel applied and resolved the single count at issue, the majority of the Board did not uphold the remaining violations. Therefore, whatever the ultimate penalty for that single count, Mr. Geisen was already subject to it. Thus, I believe the issue is effectively moot. The larger issue is the lack of clarity surrounding our standard of knowledge. The Commission has made it clear that its ruling here applies only in this instance, and we intend to request the staff to review this larger issue outside of this adjudication. I look forward to further review of this issue at that time.