

May 17, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of)
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ANDREW SIEMASZKO) IA-05-021
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NRC STAFF MOTION FOR DELAY OF PROCEEDING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Staff of the Nuclear Regulatory Commission (Staff), at the request of the Department of Justice (DOJ), moves the Atomic Safety and Licensing Board Panel for an order delaying all proceedings in the matter for one hundred and twenty (120) days, subject to the possibility of a request for an extension of time. Pursuant to 10 C.F.R. § 2.323(b) counsel for the Staff contacted counsel for Mr. Siemaszko to attempt to resolve the issue. Counsel for Mr. Siemaszko is opposed to delaying the proceeding.¹

BACKGROUND

Andrew Siemaszko, was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by FirstEnergy Nuclear Operating Company (FENOC). FENOC holds License No. NPF-3 which was issued by the Nuclear Regulatory Commission pursuant to 10 C.F.R. Part 50 on April 22, 1977. The license authorizes the operation of Davis-Besse in accordance with the conditions specified therein. The facility is located on FENOC's site near Oak Harbor, Ohio.

¹ The Staff received an additional hearing request, on May 13, 2005, from Ohio Citizen Action and Union of Concerned Scientists. Counsel to the Staff did not contact these petitioners since the petitioners have not yet been admitted as parties.

On April 21, 2005, the Staff issued an “Order Prohibiting Involvement in NRC-Licensed Activities” (Order) to Mr. Siemaszko. 83 Fed. Reg. 22719 (2005). The Order stated that Mr. Siemaszko engaged in deliberate misconduct that caused the Licensee to be in violation of the NRC requirement to maintain and provide to the NRC materially complete and accurate information in violation of 10 C.F.R. § 50.9. In particular, Davis-Besse Work Order No. 00-001846-000 described the problem to be resolved as: “Large boron accumulation was noted on the top of the RX [reactor] head and on top of the insulation. Boric acid corrosion may occur... Work Description... Clean boron accumulation from top of reactor head and on top of insulation.” Mr. Siemaszko deliberately provided materially incomplete and inaccurate information by writing “work performed without deviation” to close out Davis-Besse Work Order No. 00-001846-000 when he knew that the Reactor Head had not been cleaned of all boric acid deposits. Further, Mr. Siemaszko deliberately provided materially incomplete and inaccurate information by providing information on Condition Report No. 2000-0137 that stated, “Accumulated boron deposited between the reactor head and the thermal insulation was removed during the cleaning process performed under W.O. (Work Order) 00-001846-000. No boric acid induced damage to the head surface was noted during the subsequent inspection,” when he knew that head had not been cleaned of all boric acid deposits. 83 Fed. Reg. 22720 (2005).

The Order prohibits Mr. Siemaszko from any involvement in NRC-licensed activities for a period of five years from the effective date of the Order.² The NRC considers NRC-licensed activities to be those activities that are conducted pursuant to a specific or general license issued by the NRC, including those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

² Since the Order was not immediately effective and a hearing was requested, the Order is not effective until the conclusion of the hearing process.

On April 22, 2005, Mr. Siemaszko filed his "Request for a Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities," (Hearing Request) and denied the allegations contained in the Order. On May 11, 2005 the Hearing Request was referred to the Atomic Safety and Licensing Board Panel. For the reasons set forth below, the Staff moves the Panel to delay the above captioned proceeding.

DISCUSSION

A. Legal Standards Governing Stays of Proceedings

In matters of scheduling, the paramount consideration is the public interest. See *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539, 547 (1975). The Commission's regulations at 10 C.F.R. § 2.202(c)(2)(ii) permit a presiding officer to delay a hearing on an immediately effective order when good cause exists. In determining whether to delay an enforcement proceeding, the Commission requires a balancing of competing interests. See *Oncology Servs. Corp.*, CLI-93-17, 38 NRC 44, 50 (1993). The factors to be considered in balancing these interests are; the length of delay, the reason for the delay, the affected individual's assertion of his or her right to a hearing, prejudice to the affected person, and the risk of erroneous deprivation. *Id.* at 52-59. The Commission's regulations at 10 C.F.R. § 2.342(e) contain the standards for requesting stays of decisions or actions pending review. The standards require the presiding officer to consider (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; (4) Where the public interest lies.

B. The Requested Stay

The instant case is not an immediately effective order, so the regulations found at 10 C.F.R. § 2.202(c)(2)(ii) do not directly apply. However, the reasoning behind the regulation is still applicable, as is the case law flowing from the regulation. Similarly, this is not a request

for a stay pending review, thus 10 C.F.R. § 2.342(e) does not directly apply. However, much of the reasoning behind the regulation is still applicable. In the instant case, the Staff is seeking a stay of the proceeding due to the pendency of grand jury proceedings. Because neither regulation applies directly, the requirements of both are combined in the foregoing analysis. As discussed below this request is consistent with case law and of necessary length, in the public interest, and not prejudicial to Mr. Siemaszko. Additionally, there is a risk of irreparable injury to the government if the stay is not granted.

1. Necessity of Length of Delay

The Commission has held that in order to determine whether a delay of a proceeding is excessive, it is necessary to consider the nature of the proceeding. *Oncology* at 53. The determination of whether a delay becomes improper depends on the facts of the particular case. *See Id.* at 50. (*quoting, United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 US 555, 565 (1983)). In order to justify a delay the Staff must demonstrate an important government interest coupled with factors minimizing the risk of an erroneous deprivation. *See Id.* In the instant case, the requested delay, 120 days, is not excessive. The delay of 120 days will allow the grand jury time to complete its investigation, an important government interest. *See Thomas T. Ballantine Affidavit*, May 17, 2005, at 4 (attached). Since the Order was not immediately effective, Mr. Siemaszko has not yet been deprived of anything. Moreover, as demonstrated below, there is a strong justification for the delay, the pendency of grand jury proceedings.

2. Public Interest in the Delay

The reason for the delay justifies both the delay itself and its length. Pursuant to 10 C.F.R. § 2.336(b) within thirty (30) days of the order granting a request for hearing the Staff is required to provide all documents supporting the Staff's review of the proposed action that is the subject of

the proceeding and any Staff documents representing the Staff's determination on the proposal that is the subject of the proceeding. See 10 C.F.R. § 2.336(b)(3-4). The Office of Investigations Report (OI Report) would necessarily be produced under this regulation. The OI Report is currently being reviewed by a grand jury for possible criminal action. See Ballantine Affidavit at 2. Disclosure of the OI Report could jeopardize the criminal proceeding. See Ballantine Affidavit at 3-4. In the event an indictment is returned by the grand jury, pursuant to the Jenks Act, the defendant in a criminal case is generally not entitled to receive prior statements of a government witness until after the witness testifies on direct examination in the trial of the case. See 18 U.S.C. § 3500. The Staff has shown a strong governmental interest for the delay and, therefore, this factor weighs in favor of the Staff.

3. Risk of Erroneous Deprivation and Harm to Other Parties.

Since the Staff did not make the Order against Mr. Siemaszko immediately effective this factor weighs heavily in favor of the Staff. No action will be taken against Mr. Siemaszko until after the hearing is completed. Mr. Siemaszko will not be deprived of anything, so there is no risk of erroneous deprivation. Similarly, Mr. Siemaszko is not harmed by the delay since he has not yet been deprived of anything.

4. Assertion of Right to a Hearing and Prejudice

The Staff concedes that Mr. Siemaszko has asserted his right to a hearing, and therefore this factor weighs in his favor. Potential prejudice to Mr. Siemaszko includes both prejudice against his ability to defend against the charge in the Order and prejudice to his interest in being involved in NRC licensed activities. The delay will not prejudice Mr. Siemaszko's interest in being involved in NRC licensed activities since he can continue to be involved during the pendency of the hearing. With respect to Mr. Siemaszko's ability to defend against the action, the Staff is not aware of witnesses or other evidence presently available that would not be available should the proceeding be delayed for 120 days.

5. Likelihood of Prevailing on the Merits

The requirement that the moving party show a likelihood of prevailing on the merits is inapplicable to the instant case. A motion to stay under 10 C.F.R. § 2.342 generally arises in the context of an interlocutory appeal, or in the context of a request for a hearing or rulemaking before the issuance of a license. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 263 (2002) (petition to initiate rulemaking and stay licensing proceeding); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC 222, 225 (2002) (motion to stay proceedings for interlocutory review); *Sequoyah Fuels Corporation and General Atomics (Gore, OK Site)*, CLI-94-9, 40 NRC 1 (1994) (motion to stay discovery pending interlocutory review). In either scenario, the moving party is requesting that the Board refrain from taking a conclusive action that might ultimately be rendered moot upon further consideration of the matter on another level within the NRC. To this extent, a stay of decision under 10 C.F.R. § 2.342 is similar to an injunction against enforcing an order in the Federal Courts pending further review. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). It makes sense, in the situation where interlocutory review of an issue could dramatically redirect the course of a case, to require a showing of probable success on the merits of that appeal before granting a stay in the original proceeding.

The context in which the Staff is requesting a stay of this proceeding is fundamentally different from the typical circumstances, in that the parties here are not awaiting a direct review of an issue that could impact the direction and outcome of this case. The Staff is, rather, requesting a stay of this proceeding as a matter of deference to and cooperation with the DOJ, as DOJ proceeds with its criminal action in Federal Court. The final determination of the DOJ's criminal proceedings are immaterial to the outcome of this case. Consequently, it is not relevant or necessary to speculate as to the probable success on the merits of that action in

determining whether a stay is appropriate in the proceedings before the NRC. This criteria is, therefore, inapplicable to this Motion and does not require further analysis.

6. Irreparable Injury

The factor which is most crucial is the question of irreparable injury to movants if the stay is not granted. See *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 797 (1981). It must be established that the activity that will take place in the absence of a stay will bring about concrete harm. See *Long Island Lighting Co.*, (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985). In the instant case, the Staff can demonstrate irreparable injury. In the absence of a stay, the Staff will be required to disclose the OI Report, and witness testimony will be subject to discovery. This could cause irreparable injury to the criminal case currently before the grand jury, notably, in that grand jury proceedings are generally conducted under secrecy. See Ballantine Affidavit at 3. Moreover, the government's heightened burden of proof and the defendant's privilege against self-incrimination in a criminal proceeding are balanced by the fact that the defendant in a criminal proceeding is entitled to restricted discovery, as compared to the more generous degree of discovery granted in an administrative proceeding. *Id.* Allowing discovery to proceed in the NRC administrative proceeding could alter that balance in a manner that is substantially and unfairly prejudicial to the government's investigation and prosecution of the criminal case. *Id.*

CONCLUSION

On balance, the factors establish that good cause exists for a 120 day delay of the proceeding. There is an overriding public interest, the pending grand jury investigation, which justifies the delay, and there is no risk of erroneous deprivation, since the order is not immediately effective. The Staff's motion for a delay of 120 days should, therefore, be granted.

Respectfully submitted,

/RA/

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Counsel for NRC Staff

/RA/

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of May, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR DELAY OF PROCEEDING" in the above captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 17th day of May, 2005.

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