

June 24, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
ANDREW SIEMASZKO ) ASLBP No. 05-839-02-EA  
 )  
 ) IA-05-021  
 )

NRC STAFF RESPONSE TO ISSUES RAISED AT  
THE PRE-HEARING CONFERENCE BY OHIO CITIZEN ACTION  
AND THE UNION OF CONCERNED SCIENTISTS

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's Order at the pre-hearing conference on June 16, 2005, the Staff of the Nuclear Regulatory Commission ("Staff") hereby responds to issues raised by Ohio Citizen Action (OCA) and the Union of Concerned Scientists (UCS) (Petitioners).

BACKGROUND

On April 21, 2005, the Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities" to Andrew Siemaszko, who was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by NRC licensee FirstEnergy Nuclear Operating Company (FENOC). 70 Fed. Reg. 22719 (May 2, 2005). On May 13, 2005, Petitioners filed a timely Hearing Request.<sup>1</sup> On June 7, 2005 the Staff filed a Response to the Hearing Request.<sup>2</sup> On June 16, 2005 a pre-hearing conference was held to discuss the

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<sup>1</sup> "Request for Hearing in Response to Order (IA-05-021) Banning Andrew J. Siemaszko from Involvement in NRC-Licensed Activities," dated May 13, 2005 ("Hearing Request").

<sup>2</sup> "NRC Staff Response to Hearing Request filed by Ohio Citizen Action and the Union of Concerned Scientists," dated June 7, 2005 ("Staff Response").

Petitioner's Hearing Request, along with some other matters.<sup>3</sup> During the pre-hearing conference all parties were given until June 24<sup>th</sup> to file replies to issues raised at the pre-hearing conference. See Tr. at 9, 30. Pursuant to the Board's request, the Staff: 1) responds to a Board inquiry regarding when an organization has been permitted to intervene in an enforcement case; 2) responds to Petitioners' asserted injury; 3) responds to Petitioners' assertion that if an organization proffers an admissible contention, that is sufficient to confer standing; 4) questions the propriety of Mr. Lochbaum's representation of Petitioners; 5) notes that to the extent Petitioners are requesting discretionary intervention, they have failed to meet the standards for discretionary intervention.

#### DISCUSSION

##### A. Enforcement Cases Where the Commission Has Permitted Intervention

The Board requested that the Staff include in its submission case law where an organization or person has sought to intervene in an enforcement action and where that has, in fact, been granted. Tr. at 30. The Commission has granted intervention as a matter of right in an enforcement action on only one prior occasion. In companion decisions issued in the *Sequoyah Fuels* enforcement proceeding, the Commission held that the NRC's statutory and regulatory framework permits intervention as a matter of right to one who supports or challenges an enforcement order. *Sequoyah Fuels Corp. And General Atomics (Gore, Oklahoma Site)*, CLI-94-13, 40 NRC 78; CLI-94-12, 40 NRC 64 (1994).

The enforcement action at issue in the *Sequoyah Fuels* proceeding was a Staff order holding the licensee and its parent company jointly and severally liable for funding the decommissioning of the licensee's site. Both Native Americans for a Clean Environment (NACE) and the Cherokee Nation sought to intervene in support of sustaining the order.

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<sup>3</sup> "Prehearing Conference In the matter of Andrew Siemaszko" June 16, 2005.

The Licensing Board presiding over the case determined the organizations had both standing and admissible contentions and accordingly granted intervention. *Sequoyah Fuels*, LBP-94-19, 40 NRC 9 (1994); LBP-94-8, 39 NRC 116 (1994). The Commission affirmed with respect to both organizations.

The main issue raised on appeal was whether an individual or organization who is not the direct target of an order has standing to intervene in support of sustaining the order. CLI-94-12, 40 NRC at 68. The Commission held that intervention is permissible where a petitioner seeks to sustain an order, if that petitioner can demonstrate that it may be “adversely affected” by the outcome of the proceeding if the order is not sustained. *Id.* The Commission stated:

In exercising this authority [to define the scope of public participation in its proceedings], the Commission has permitted participation in its adjudicatory proceedings by those who can show that they have a cognizable interest that may be adversely affected if the proceeding has one outcome rather than another.

*Id.* at 69. Furthermore, a petitioner “may only intervene with respect to matters found to be within the scope of the Staff’s enforcement order and may not expand the breadth of the order or the proceeding.” *Id.* at 70.

In *Sequoyah Fuels*, the Commission found that both NACE and the Cherokee Nation had standing to participate in the proceeding. NACE had provided an affidavit from one of its members authorizing NACE to represent his interest. The member’s residence was proximate to the licensee’s site, and the member asserted that if the site was not properly decommissioned his family’s health would be adversely affected by contaminated ground and surface water. *Id.* at 72. The Commission held that this interest was sufficient to confer standing in support of sustaining the order. *Id.* at 77. The Commission also sustained the Board’s determination that the Cherokee Nation had standing on grounds that it owned land proximate to the site which would face continued contamination if the site was not adequately

decommissioned. CLI-94-13, 40 NRC at 79. In both cases, the intervenors established interests cognizable under the AEA and NEPA, and they were able to show that the order in question directly impacted their interests.

The *Sequoyah Fuels* case is different from the case at bar, in that the intervenors in *Sequoyah Fuels* demonstrated that they had cognizable interests that could be adversely affected by a particular outcome of the proceeding. With regard to the instant proceeding, neither UCS nor OCA have asserted any interests cognizable under the AEA or NEPA, and neither petitioner has demonstrated how any of their interests have been directly affected by the Order at issue in this proceeding. Therefore, unlike the intervenors in *Sequoyah Fuels*, the Petitioners here have not demonstrated that they have standing and their hearing request should accordingly be denied.

B. Petitioners Do Not Have a Redressable Injury

In the prehearing conference, Petitioners stated that their interest is to “fix that harm [done to Mr. Siemaszko] but we also want to ensure that the NRC stops inflicting harm on others down the road.” Tr. at 29. Petitioners further stated “Our goal ..... is to flag an unfair sanction and flag it in such a way that it gets, the process gets, fixed so that the next unfair sanction doesn’t occur.” Tr. at 29. An enforcement proceeding is limited to the terms of the Order. See *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983). Petitioners cannot obtain the result they seek in this case, “to fix the process” since this is not a redressable injury. See *State of Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 407 (2004) (“Our adjudicatory process is not an appropriate forum for petitioners... to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings.”)

C. An Organization Must Establish Standing, Not Just Admissible Contentions

At the pre-hearing conference, Petitioners asserted that any potential party which raises

contentions that have merit should be admitted to a proceeding. See Tr, at 16-18. This position is inconsistent with Commission regulations. Commission regulations clearly state that prior to granting a requested hearing the Board must determine that the petitioner has standing and has proposed an admissible contention. See 10 CFR 2.309(a). While the Staff has previously demonstrated that Petitioners have not proffered admissible contentions,<sup>4</sup> even assuming *arguendo* that Petitioners had proffered an admissible contention their lack of standing would still be fatal to their hearing request.

D. Mr. Lochbaum is not an Authorized Representative

Based on the pre-hearing conference, it is unclear to the Staff whether Mr. Lochbaum purports to appear solely on behalf of the UCS, or also represents OCA. The hearing request stated that it was filed on behalf of "Ohio Citizens Action and the Union of Concerned Scientists." See *Hearing Request* at 1. However, the petition was signed solely by Mr. Lochbaum, Nuclear Safety Engineer for the UCS with a copy sent to Sandy Buchanon, Executive Director, OCA. No individuals from OCA participated in the pre-hearing conference; the sole participant was David Lochbaum. Pursuant to 10 CFR 2.314(b) any person appearing in a representative capacity must file a written notice of appearance. The Staff has not yet received a written notice of appearance from anyone purporting to represent either the UCS or OCA. Moreover, pursuant to 10 CFR 2.314(b), a partnership, corporation, or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. When a partnership, corporation, or unincorporated association is represented by a member or officer who is not an attorney-at-law, the entity is considered to be pro-se. The Staff acknowledges that Mr. Lochbaum is a member of UCS, and thus, is presumably authorized to appear pro-se on behalf of UCS once he files a written notice of appearance. However, since

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<sup>4</sup> See *Staff Response* at 11-15.

Mr. Lochbaum is not an attorney-at-law he cannot represent OCA, an association of which he is presumably not a member or officer. *See General Electric Company* (GE Test Reactor, Vallecitos Nuclear Center), LBP-79-28, 10 NRC 578, 584 (1979) (holding that there is no precedent to allow an non-attorney individual who is not a member of a group to appear in a representative capacity.) Thus, if UCS and OCA wish to be considered as joint Petitioners they must be represented by an attorney-at-law.

E. Petitioners are not Entitled to Discretionary Intervention

At the pre-hearing conference Petitioners asserted that “we feel that it’s more the contentions that we’ve raised, if they have merit or not, that should determine whether we are a party to this proceeding or not, not so much whether I live within eyesight of the cooling towers.” Tr. at 17. If this is a request for discretionary intervention, the Petitioners have not met the standards for discretionary intervention. *See* 10 C.F.R. §2.309(e). In order to grant a request for discretionary intervention the Board must balance the following factors:

- (1) The extent to which the requester’s/petitioner’s participation may reasonably be expected to assist in developing a sound record;
- (2) The nature and extent of the requestor’s/petitioner’s property, financial or other interests in the proceeding; and
- (3) The possible effect of any decision or order that may be issued in the proceeding on the requestor/petitioner’s interest;
- (4) The availability of other means whereby the requestor’s/petitioner’s interest will be protected;
- (5) The extent to which the requestor’s/petitioner’s interest will be represented by existing parties; and
- (6) The extent to which the requestor’s/petitioner’s participation will inappropriately broaden the issues or delay the proceeding. See 10 C.F.R. § 2.309(e).

A balancing of these factors should result in a denial of discretionary intervention. Petitioners have failed to establish how they could contribute to a sound record of the facts surrounding Mr. Siemaszko’s conduct, thus the first factor weighs against Petitioners. The Staff has previously shown that Petitioners have failed to establish standing to intervene in the proceeding, thus the second and third factors weigh against Petitioners. There are other, more appropriate

mechanisms to raise Petitioners' concerns with the Staff enforcement policy, thus the fourth factor weighs against Petitioners. Mr. Siemaszko is able to represent Petitioners' interest in reversing the Order, thus the fifth factor weighs against Petitioners. Since Petitioners wish to challenge the Staff enforcement policy their participation would broaden the issues, thus the sixth factor weighs against Petitioners. Since all factors weigh against Petitioners being granted discretionary intervention, to the extent Petitioners were attempting to request discretionary intervention, their request should be denied.

CONCLUSION

For the reasons described above, since the Petitioners have failed to establish standing, the Hearing Request should be denied.

Respectfully submitted,

**/RA by Sara Brock/**  
Sara E. Brock  
Melissa L. Duffy  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 24<sup>th</sup> day of June, 2005

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ISSUE RAISED AT THE PRE-HEARING CONFERENCE BY OHIO CITIZEN ACTION AND THE UNION OF CONCERNED SCIENTISTS" 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 24<sup>th</sup> day of June, 2005.

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