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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chairman
E. Roy Hawkens
Dr. Peter S. Lam

In the Matter of	Docket No. IA-05-021
ANDREW SIEMASZKO	ASLBP No. 05-839-02-EA
	June 24, 2005

REPLY OF OHIO CITIZEN ACTION AND UNION OF CONCERNED SCIENTISTS TO NRC STAFF RESPONSE TO HEARING REQUEST

Ohio Citizen Action and the Union of Concerned Scientists (UCS) reply to the NRC Staff's response dated June 7, 2005, response to our request for a hearing in the subject proceeding. For the reasons provided below, Ohio Citizen Action and UCS seek to be allowed to participate in the proceeding at the Panel's discretion and admittance of Contention Nos. 1, 2, 3, and 5 from our May 13, 2005, hearing request. We concur with the NRC Staff's response regarding our Contention No. 4 and respectfully withdraw it from consideration.

On the Question of Standing

The Union of Concerned Scientists (UCS) has approximately 1,000 members in Ohio. UCS could very likely find one or more of its members living close to the Davis-Besse site who would sign an affidavit about being concerned about safety lapses at the reactor, about needing to be reassured that those responsible for the lapses have been held accountable, and authorizing UCS to act to resolve these concerns. But while any such individual affidavits would be genuine and sincere, they really would not be why UCS undertook this effort or why UCS deserves standing in this proceeding. It would be a legal ruse that might get UCS admission to the proceeding, but for the wrong reasons.

The record clearly shows that (a) UCS has steadfastly engaged the NRC for many years via an array of formal and informal methods seeking to achieve consistent implementation of the agency's enforcement policy, including as applied to individuals, and (b) the NRC has repeatedly relied on UCS as its primary representative of the general public about the agency's enforcement policy and its implementation.

The NRC's proposed individual sanction against Mr. Andrew Siemaszko and only Mr. Siemaszko for the problems at Davis-Besse is undoubtedly the strongest evidence for UCS's right and need to participate in this proceeding. Had the NRC staff properly responded to UCS's

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past informal and formal expressions of concern about inconsistent and biased implementation of the enforcement policy by taking steps to correct the root causes, this ill-founded Siemaszko sanction would have been avoided. UCS's interest is in fair, unbiased, and consistent implementation of the NRC's enforcement policy. The proposed sanction against Mr. Siemaszko "harms" this interest just as failure to now fix the wrongful implementation will likely produce future "harms." UCS hopes that participation in this proceeding will focus attention on the biased, inconsistent implementation of the NRC's enforcement policy in order for much needed reforms to occur.

UCS points to the following exchange between a resident living near the Davis-Besse nuclear plant and the NRC staff as further evidence of the biased, inconsistent implementation of the NRC's enforcement policy:

> Tim Dussel: "*I have not seen ... FirstEnergy or anyone has been held accountable for any of these. This has been going on for a year and a half, and there's been one person supposedly that was fired who was an engineer and they wanted to put most of the blame on him, but I believe there's a whole lot of people here that's made a whole lot of mistakes that should be held accountable, and if you want the public to trust you, until that's done, no one is going to trust anyone.*"[1]

The engineer mentioned by Mr. Dussel is Andrew Siemaszko. The Chairman of the NRC's 0350 Restart Panel for Davis-Besse responded to Mr. Dussel as follows:

> John A. Grobe: "*The second comment you made had to do with personal accountability and FirstEnergy has taken fairly extensive actions with response to the accountability of the individuals that caused the situation to occur. I believe that there were – I might not have this number exactly correct, but I believe there were 19 personal actions that were taken including termination and other types of personal actions. There's a whole new management team at the Davis-Besse facility, so I think the information that you may have read in the newspaper regarding one engineer was an incorrect characterization of what had happened at Davis-Besse.*"[2] [emphasis added]

Mr. Grobe informed the public that singling out Mr. Siemaszko as the sole person responsible "*was an incorrect characterization of what had happened at Davis-Besse.*" Mr. Grobe additionally informed the public that FirstEnergy held numerous persons, perhaps as many as 19, responsible. Yet the NRC sanctioned only one person – Mr. Siemaszko, who just happened to be on the lowest rung of the corporate ladder of those sanctioned by FirstEnergy.

And it is not just Mr. Dussel, Ohio Citizen Action, and UCS who believed that full and proper accountability has yet to occur. On April 23, 2003, FirstEnergy transmitted to the NRC the results from a work force survey conducted at Davis-Besse by an independent company. The survey results showed:

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[1] Nuclear Regulatory Commission, Transcript, Meeting held on Wednesday, July 9, 2003, at 7:00 p.m. at Oak Harbor High School, Oak Harbor, Ohio, page 18, lines 7-17.

[2] Nuclear Regulatory Commission, Transcript, Meeting held on Wednesday, July 9, 2003, at 7:00 p.m. at Oak Harbor High School, Oak Harbor, Ohio, page 19, line 17 to page 20, line 4.

> *"...many personnel interviewed perceive that Senior Management has not acknowledged their accountability and responsibility for the reactor head event. These personnel expressed disappointment and frustration that this had not taken place. Staff point out that some of the managers directly involved in the event remain in the organization and have not been reassigned to other sites and positions. The reassignments are perceived as indicating that the managers have not been held accountable by the organization."*[3]

The NRC's unfair and inequitable singling out of Mr. Andrew Siemaszko for accountability can only reinforce the perception among the workers at Davis-Besse that the people "directly involved" in the problems got away with it.

But it was not just Mr. Dussel, Ohio Citizen Action, UCS, and many of the workers who believed that accountability has not occurred. The late H. Peter Burg, then Chairman of the Board and Chief Executive Officer of FirstEnergy, told the NRC Chairman and Commissioner during a briefing on February 4, 2003, that:

> *"Davis-Besse management had become complacent and lost their sense of accountability and ownership."*[4]

Mr. Siemaszko was not part of management at Davis-Besse, so it is clear that Mr. Berg was not blaming him and only him for Davis-Besse.

As stated above, UCS has a longstanding record of engagement with the NRC on the issue of fair and consistent application of the agency's enforcement policy. Highlights of UCS's engagement over the past eight (8) years:

Date	Activity
September 9, 1997	UCS sent a letter to the NRC Chairman and Commissioners expressing concerns with untimely and inconsistent enforcement actions. UCS stated: *"Subjective enforcement, even if warranted for a specific licensee, is counter-productive to the NRC's mission."*[5]
October 14, 1997	NRC's Director of the Office of Enforcement responded to UCS's letter explaining that the concerns would be considered in a pending revision of the enforcement policy:

> *At the outset, you should be aware that the staff is in the process of reviewing its experience with the NRC Enforcement Policy*

[3] Letter dated June 25, 2003, from David Lochbaum, Union of Concerned Scientists, to James E. Dyer, Regional Administrator, Nuclear Regulatory Commission, "NRC Office of Investigations Input to Davis-Besse Restart Decision."

[4] Nuclear Regulatory Commission, Transcript, February 4, 2003, Commission Briefing on Lessons Learned Davis-Besse Reactor Vessel Head Degradation, Comments of Peter Burg, Chairman and Chief Executive Officer, FirstEnergy, page 10, lines 9-11.

[5] Letter dated September 9, 1997, from David Lochbaum, Union of Concerned Scientists, to NRC Chairman and Commissioners, "Timely and Consistent Enforcement Actions."

Date	Activity
	(NUREG-1600) that was substantially revised in June 1999. An opportunity to comment on the revised policy was noticed in the Federal Register at 62 Fed. Reg. 5494 (February 5, 1997). While the comment period has closed, we are considering your comments in the review.[6]
December 5, 1997	In direct response to UCS's efforts, NRC conducts a public meeting to gather input on its enforcement policy.
	Jim Lieberman opened the meeting, noting that Dave Lochbaum had sent a letter to the NRC in September raising questions on the enforcement policy and indicating concern about the enforcement program in general. The NRC offered to meet with Lochbaum, who invited NEI to attend with him. Dave Lochbaum noted that UCS concerns are not too dissimilar from NEI's but, since there are some differences, he felt it constructive for the NRC to hear from both. Lochbaum believes there are major problems in the consistency – of lack thereof – of the enforcement program.[7]
	The NRC staff's own meeting summary characterized UCS's primary concern as:
	UCS stated that the Enforcement Policy was not meeting its objective of enforcement actions "sending the appropriate regulatory message," because of the inconsistencies.[8]
January 14, 1998	UCS sent a letter to the NRC's Director of the Office of Enforcement pointing out an inconsistency between a sanction levied by the NRC on a worker at Big Rock Point for deliberate records falsification and the lack of sanction by the NRC on a worker at Connecticut Yankee who also deliberately falsified records.[9]
April 3, 1998	UCS sent a letter to the NRC Chairman and Commissioners expressing concern that the NRC staff's Integrated Review of Assessment Process failed to examine the enforcement policy and its implementation:

[6] Letter dated October 14, 1997, from James Lieberman, Director – Office of Enforcement, Nuclear Regulatory Commission, to David Lochbaum, Union of Concerned Scientists.
[7] Nancy Chapman, Bechtel Licensing Information Service, SERCH MS-97-73 dated December 5, 1997, "NRC Staff Meetnig with NEI/UCS on NRC's Enforcement Policy and Enforcement."
[8] Memo dated December 12, 1997, from James Lieberman, Director – Office of Enforcement, Nuclear Regulatory Commission, to L. J. Callan, Executive Director of Operations, Nuclear Regulatory Commission, "Summary of December 5, 1997, Public Meeting on the NRC's Enforcement Policy and Enforcement Program."
[9] Letter dated January 14, 1998, from David Lochbaum, Union of Concerned Scientists, to James Lieberman, Director – Office of Enforcement, Nuclear Regulatory Commission, "Example of Inconsistent NRC Enforcement Action."

Date	Activity
	Although Mr. Lieberman made a cameo appearance during the Commission briefing [conducted April 2, 1998], the area of timely and consistent enforcement actions seemed largely absent from the IRAP efforts. Until the extremely serious problems with the enforcement program are corrected, an assessment program which by necessity relies on its input will be corrupted. ... The Commission should very seriously consider fixing the major problems with the enforcement program before implementing any changes to the assessment program. Otherwise, even a perfect assessment program will be tarred by seemingly arbitrary and capricious enforcement actions.[10]
July 17, 1998	The NRC Chairman and Commissioners convene a meeting of stakeholders to hear and discuss their concerns. The external stakeholders at this meeting were Harold Ray, Executive Vice President of Southern California Edison; Joe Colvin, President and Chief Executive Officer of the Nuclear Energy Institute; Earle Nye, Chairman of the Board and Chief Executive Officer of the Texas Utilities Company and Chairman of the Board of the Nuclear Energy Institute; Zack Pate, Chairman of the World Association of Nuclear Operators; Corbin McNeill, President and Chief Executive Officer of the PECO Energy Company; Dr. Forrest Remick, former Chairman of the Advisory Committee on Reactor Safeguards and a former NRC Commissioner; and David Lochbaum Nuclear Safety Engineer for the Union of Concerned Scientists. UCS was the only organization representing the public invited by the NRC to this panel. UCS expressed the following concern:
	The enforcement policy, the 2.206 policy program, and the allegation process have been revised in recent years, but they are no better than they were a decade ago. NRC staff does not consistently enforce criteria, whether they are 10 CFR 50 regulations or their own policies.[11]
September 3, 1998	Continuing a series of public meeting initiated by UCS's letter of September 1997, the NRC's Office of Enforcement met with UCS and NEI to discuss proposed changes to the enforcement policy.[12]
October 13, 1998	The NRC's Office of Enforcement conducted another public meeting with UCS and NEI regarding proposed changes to the enforcement

[10] Letter dated April 3, 1998, from David Lochbaum, Union of Concerned Scientists, to the NRC Chairman and Commissioners, "Comments on Staff's Integrated Review of Assessment Process."
[11] Nuclear Regulatory Commission, Transcript, July 17, 1998 Public Meeting on Stakeholders' Concerns," page 17, lines 1-7.
[12] Nuclear Regulatory Commission memo to file dated September 9, 1998, "Public Meeting with NEI, UCS, and Public Citizen."

Date	Activity
	policy.[13]
February 9, 1999	The NRC's Office of Enforcement conducted another public meeting with UCS and NEI regarding proposed changes to the enforcement policy.[14]
May 25, 1999	UCS submitted a 2.206 petition to the NRC seeking sanction against the Radiation Protection Manager at FirstEnergy's Perry Nuclear Power Plant for his discriminatory action against a Radiation Protection Supervisor that culminated in the NRC proposed a $110,000 civil penalty on the licensee for a 10 CFR 50.7 violation.
June 23, 1999	The NRC denied the UCS petition that requesting enforcement action against the Radiation Protection Manager at Perry.
June 28, 1999	UCS sent a letter to the NRC's Deputy Executive Director for Operations responsible for the Office of Enforcement about implementation of the enforcement policy. UCS stated:

> *As you know, UCS has participated in a series of meetings with members of the NRC enforcement staff and with representatives of the nuclear industry about proposed changes to the enforcement policy. Despite this year-plus effort, we remain unable to reconcile the NRC's enforcement inactions with its stated policies. It may be that we still do not understand the enforcement policies, or it may be that the NRC is not consistently implementing the policies. The recent enforcement inaction involving workers at Perry is an example.*
>
> *On May 20, 1999, the NRC proposed a $110,000 civil penalty against FirstEnergy Nuclear Operating Company because its Radiation Protection Manager discriminated against a worker at Perry in violation of the employee protection requirements of 10 CFR 50.7.*
>
> *On May 25, 1999, UCS submitted a petition pursuant to 10 CFR 2.206 requesting that the NRC take sanctions against the Radiation Protection Manager in addition to the corporate sanctions against FirstEnergy.*
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> *On June 23, 1999, the NRC denied our petition. The stated rationale included:*

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[13] Nuclear Regulatory Commission memo to file dated October 20, 1998, "Public Meeting Summary."

[14] Memo dated February 19, 1999, from Desiree R. Calhoun, Acting Enforcement Specialist, Nuclear Regulatory Commission, to James Lieberman, Director – Office of Enforcement, Nuclear Regulatory Commission, "Summary of February 9, 1999 Meeting with the Nuclear Energy Institute (NEI) and the Union of Concerned Scientists (UCS) Regarding Application of the Concept of Regulatory Significance in the Enforcement Policy."

Date	Activity
	As part of our internal deliberations during the enforcement process, consideration was given to taking enforcement action against the Manager. The NRC determined, however, that the Manager was not familiar with the requirements of 10 CFR 50.7. In your submittal, you argued that even if this is accurate, that ignorance of the law is no excuse. The NRC agrees that knowledge and understanding of the law are not necessary elements in determining whether a violation of 10 CFR 5.07 occurred. These elements are relevant, however, in determining whether enforcement action can be taken against the individual based in a violation of 10 CFR 50.5, the rule on deliberate misconduct.[15]
August 13, 1999	UCS submitted a petition for rulemaking: *Pursuant to §2.802 of Title 10 of the Code of Federal Regulations, I hereby submit the enclosed petition for rulemaking. This petition for rulemaking seeks to require NRC's licensees to provide specific training to management (first-line supervisors, managers, directors, and officers) regarding the federal regulations for employee protection. UCS feels that this rulemaking is required based on the NRC staff's position that they are unable to take enforcement actions against individuals who violate the employee protection regulations (i.e. 10 CFR 50.7) unless they explicitly prove that these individuals knew that their actions violated these important regulations. UCS strongly feels that nuclear industry management should no longer be allowed to use "ignorance of the law" as an excuse for violating employee protection requirements. These illegal activities will only stop when the NRC holds wrong-doers personally accountable.*[16]
November 30, 1999	UCS submitted a letter to the new NRC Director of the Office of Enforcement about inconsistent implementation of the enforcement policy: *To re-cap, the NRC set aside any sanctions against the plant owner and guilty individuals in the contract engineer case, set aside any sanctions against the plant owner and guilty*

[15] Letter dated June 28, 1999, from David Lochbaum, Union of Concerned Scientists, to Dr. Malcolm R. Knapp, Deputy Executive Director for Regulatory Effectiveness, Nuclear Regulatory Commission, "Incomprehensible Enforcement Inaction."

[16] Letter dated August 13, 1999, from David Lochbaum, Union of Concerned Scientists, to Secretary, Nuclear Regulatory Commission, "Submittal of Petition for Rulemaking – Employee Protection Training."

Date	Activity
	individuals in the Maintenance Rule case, and lowered the proverbial boom on the clerk in the fudged application case. *The revised reactor oversight program was touted as being risk-informed, with agency action purportedly commensurate with the safety implications of any violation. These three enforcement actions appear to fall short of these expectations. By any measure, the fudged application case had the lowest safety significance, yet it received the greatest sanction. By any measure, the Maintenance Rule case had the highest safety significance, yet it received the lowest sanction.*[17]
December 21, 1999	*The final report by the Pilot Program Evaluation Panel on the revised reactor oversight process is submitted to the NRC Chairman and Commissioners:* *In SECY-99-007, "Recommendations for Reactor Oversight Process Improvements," and SECY-99-007A, "Recommendations for Reactor Oversight Process Improvements (Follow-up to SECY-99-007)," the NRC staff proposed a new risk informed regulatory oversight process for commercial nuclear power plant licensees. In SECY-99-007A, the staff also described a pilot effort for testing the new oversight process at selected commercial nuclear power plants, and stated that it would establish a Pilot Program Evaluation Panel (PPEP) to independently evaluate the pilot program results, and advise on the success of the pilot effort and lessons learned. The Director, Office of Nuclear Reactor Regulation established PPEP by charter under the rules of the Federal Advisory Committees Act (FACA):* *Mr. Frank Gillespie, PPEP Chairman, Nuclear Regulatory Commission* *Mr. Masoud Bajestani, Tennessee Valley Authority* *Mr. George Barnes, Commonwealth Edison Company* *Mr. Kenneth Brockman, Nuclear Regulatory Commission* *Mr. James Chase, Omaha Public Power District* *Mr. Stephen Floyd, Nuclear Energy Institute* *Mr. David Garchow, PSEG Nuclear* *Mr. Geoffrey Grant, Nuclear Regulatory Commission* *Mr. James Lieberman, Nuclear Regulatory Commission* *Mr. David Lochbaum, Union of Concerned Scientists*

[17] Letter dated November 30, 1999, from David Lochbaum, Union of Concerned Scientists, to William R. Borchardt, Director – Office of Enforcement, Nuclear Regulatory Commission, "Questions About Enforcement Under the Revised Reactor Oversight Program."

Date	Activity
	Mr. Bruce Mallett, Nuclear Regulatory Commission *Mr. James Wiggins, Nuclear Regulatory Commission* *Mr. Gary Wright, Illinois Department of Nuclear Safety* *Mr. Mohan Thadani, Designated Federal Official, Nuclear Regulatory Commission* [18]
	UCS was the only organization representing the general public invited by the NRC to serve on this FACA panel.
January 9, 2001	In response to a *Federal Register* notice seeking public comments about the scope of a proposed public workshop on the first year of the revised reactor oversight process, UCS commented: *As articulated in letters dated November 30, 2000, and December 12, 2000, to the NRC Director of the Office of Enforcement, UCS finds recent enforcement actions anything but consistent and understandable. Thus, UCS believes it would be useful to explore this important area during the public workshop.* [19]
March 14, 2001	UCS made a presentation at the NRC's Regulatory Information Conference about inconsistent implementation of the enforcement policy. *Among 23 enforcement actions taken by NRC against individuals in the past 2 years:* • *Mrs. VanCleave was the lowest ranking individual among the 23 cases studied* • *Mrs. VanCleave's violation had the least actual and potential risk* • *Mrs. VanCleave was cited for willful violation or deliberate misconduct, as were ALL other 22 individuals* • *Mrs. VanCleave gained employment as a clerk through her actions* [20]
April 2, 2001	UCS formally commented on the NRC staff's proposed revision to the enforcement policy:

[18] Memo dated December 21, 1999, from William D. Travers, Executive Director for Operations, Nuclear Regulatory Commission, to NRC Chairman and Commissioners, "Final Report of the Pilot Program Evaluation Panel."

[19] Letter dated January 9, 2001, from David Lochbaum, Union of Concerned Scientists, to David L. Meyer, Chief – Rules Review and Directive Branch, Nuclear Regulatory Commission, providing comments on first year of the reactor oversight process in response to request for public comment published in the *Federal Register* (Vol. 65, No. 241, pp. 78215-78217).

[20] Presentation slides of David Lochbaum, Union of Concerned Scientists, at the NRC Regulatory Information Conference, March 14, 2001.

Date	Activity
	UCS disagrees with the staff's assertion that "these proposed changes will help to make the Enforcement Policy easier for all stakeholders to understand and easier for internal stakeholders to implement." We disagree because the proposed changes do not address the two major flaws in the current policy – subjectivity and secretiveness. ... UCS examined the information available on twenty-three enforcement actions taken by the NRC in the past two years against nuclear power industry workers. We also reviewed the information available on thirteen cases in the same period where the NRC did not take enforcement action against nuclear power industry workers for comparable behavior. ... Basically, we concluded that the NRC is not achieving its goal of "responding to violations of regulations in a predictable and consistent manner that reflects the potential safety impact of the violations."[21]

The record is very clear that UCS has long engaged the NRC for many years via a wide array of informal and formal means regarding inconsistent and biased application of the enforcement policy to individuals.[22] The NRC recognized this vested interest of UCS and the role of the organization by means such as making UCS the sole representative of the general public on the Federal Advisory Committee Act panel chartered to evaluate the revised reactor oversight process, which included a revamped enforcement program.

The record is equally clear that UCS extensively engaged the NRC via a wide array of informal and formal means regarding the problems at Davis-Besse, which the NRC now wants to hold Mr. Siemaszko solely accountable for causing. Abbreviated highlights of UCS's engagement since March 2002:

Date	Activity
June 12, 2002	UCS submitted a letter to the Chairman of the NRC's 0350 Restart Panel for Davis-Besse posing several questions the NRC staff should answer before authorizing the restart of the plant. Six of UCS's questions related directly to the question of accountability for the problems at Davis-Besse:
	How many of the top twenty managers/supervisors in place at Davis-Besse on February 16, 2002 (when the plant shut down for

[21] Letter dated April 2, 2001, from David Lochbaum, Union of Concerned Scientists, to Frank Congel, Director – Office of Enforcement, Nuclear Regulatory Commission, "Comments on Proposed Revision to NRC Enforcement Policy on Actions Taken Against Individuals."

[22] For example, UCS strongly protested the enforcement sanction by the NRC on Mrs. Gail C. VanCleave. But because we protested it via a collection of informal means, the NRC staff never formally considered it. This proceeding is a formal means for the NRC staff to formally address the longstanding concern about biased enforcement actions.

Date	Activity

its current outage) have left FirstEnergy?

If the behavior of Ms. VanCleave was such a "clear and present danger" to public health and safety that the NRC could simply not trust her to work in the nuclear industry, is the behavior of FirstEnergy management at Davis-Besse from 1996 through 2002 better than or worst than that of Ms. VanCleave?

If Ms. VanCleave's behavior is better, will the NRC ban any FirstEnergy managers and supervisors from working in the nuclear industry?

The NRC banned Ms. VanCleave from working at D C Cook and every other nuclear power plant in the United States because of her indiscretion at D C Cook. Does the NRC care that managers or supervisors fired or otherwise removed from Davis-Besse because of that troubled plant's problems find work at other UCS nuclear power plants?

Will the results of these investigations [by the NRC's Office of Investigations] be publicly available prior to restart?

If not, how can people living around the plant have any assurance that workers and managers at Davis-Besse did not violate federal safety regulations and place them at undue risk?[23]

Thus, UCS linked the pre-existing concerns about inequitable enforcement actions to the problems at Davis-Besse.

December 30, 2002 — The NRC's Office of the Inspector General (OIG) issued a report on the NRC's oversight of Davis-Besse. According to OIG:

OIG completed an inquiry into concerns raised by the Union of Concerned Scientists (UCS) regarding a perceived lack of NRC oversight of the Davis-Besse Nuclear Power Station (DBNPS). In August 2001, the NRC issued NRC Bulletin 2001-01 which sought to have licensees shut down and perform inspections by December 31, 2001, on plants identified as being highly susceptible to vessel head penetration nozzle cracking. UCS alleged that NRC allowed DBNPS to continue operating until February 16, 2002, without performing those inspections despite indications of significant cracking to the reactor vessel head.

[23] Letter dated June 12, 2002, from David Lochbaum, Union of Concerned Scientists, to John A. Grobe, Chairman – 0350 Restart Panel, Nuclear Regulatory Commission, "Questions for Davis-Besse Manual Chapter 0350 Panel."

Date	Activity
	As a result of this inquiry, OIG found that NRC's decision to allow DBNPS to continue operating until February 16, 2002, without performing vessel head penetration nozzle inspection was driven in large part by a desire to lessen the financial impact on the licensee that would result from an earlier shutdown. ... OIG also found that NRC staff were reluctant to take regulatory action against a licensee absent absolute proof of a violation, despite strong indications that DBNPS did not comply with NRC regulations and plant technical specifications and may have operated with reduced safety margins. In addition, OIG found that the NRC staff developed a well-documented technical basis for preparing an order to shut down DBNPS, and on November 12, 2001, informed the Commission of the intent to shut down the plant on or before December 31, 2001. However, contrary to the strong justification present in the order, the NRC never forced a shutdown. Instead, the NRC staff concluded that the licensee could safely operate DBNPS until February 16, 2002, provided the licensee implemented several compensatory measures it had developed. OIG found that the NRC staff did not document its analytical bases for reaching this conclusion.[24] This UCS engagement is directly related to Contention No. 1 raised by Ohio Citizen Action and UCS. The interviews conducted by OIG, and obtained by UCS in response to a Freedom of Information Act request, show that the NRC staff knew the reactor vessel head had not been completely cleaned during the refueling outage in 2000 and that Davis-Besse restarted from that outage with boric acid remaining on the reactor vessel head (i.e., the information allegedly withheld by Mr. Siemaszko from FirstEnergy and the NRC) and used this knowledge as basis for the shutdown order they drafted – but did not issue.
April 3, 2003	The NRC's 0350 Restart Panel for Davis-Besse took no action on the concerns raised by UCS about accountability for problems at Davis-Besse: *Description of Issue: VanCleave was banned from work at all NPPs. Does the NRC care that fired FENOC managers and supervisors work at other NPPs?* *Description of Resolution – No action. The behavior of management is being evaluated via an ongoing OI investigation. If a willful violation is determined, the case will be evaluated on its own merits in accordance with NUREG-1600 "General*

[24] Office of the Inspector General, Nuclear Regulatory Commission, Semiannual Report October 1, 2002 – March 31, 2003, pages 17-18.

Date	Activity
	Statement of Policy and Procedures for NRC Enforcement Actions.[25]
April 2003	UCS submitted a legal memo outlining, with considerable detail, the potential acts of wrongdoing by FirstEnergy and its workers (including but not limited to Mr. Andrew Siemaszko) to the U.S. Attorney for the Northern District of Ohio.
July 2003	Amy Ryder of Ohio Citizen Action and David Lochbaum of UCS met with Mr. James Canepa and Mr. Dale Vitale of the Office of the Attorney in Ohio to provide a copy of the UCS legal memo and request that the State of Ohio encourage the NRC to complete its investigations and take all appropriate enforcement actions before authorizing restart of Davis-Besse. The Ohio Attorney General declined this request: *On behalf of Mr. Petro [Attorney General, State of Ohio], Jim Canepa and I want to thank you and Ms. Ryder explaining your concerns in relation to the intended restarting of operations at the Davis-Besse power plant near Toledo, Ohio. ... While your evidence and legal research may call into question the decisions of FirstEnergy and the NRC, any deviation from applicable standards falls within the purview of the NRC. Any enforcement of those standards, civil or criminal, would be undertaken by the U.S. Attorney at the request of the NRC or another federal agency.*[26]
September 15, 2003	On behalf of a large number of organizations (including Ohio Citizen Action) and individuals across the United States, UCS submitted a resolution to the NRC Chairman and Commissions with the firmly held conviction: **WE LACK CONFIDENCE IN THE NUCLEAR REGULATORY COMMISSION.** This resolution listed several reasons for this conviction, including: *The NRC prepared an order to shut down the Davis-Besse nuclear plant for safety inspections, then shelved it. Documents obtained under the Freedom of Information Action clearly indicate that the NRC knew at the time it was violating four of the five criteria it had established for such safety decisions. The*

[25] Memo dated March 12, 2004, by John A. Grobe, NRC Chairman – Davis-Besse Oversight Panel, "Revised April 3, 2003, Minutes of Internal Meeting of the Davis-Besse Oversight Panel (Revised RAM Closure Attachment)."
[26] Letter dated July 23, 2003, from Dale T. Vitale, Senior Deputy Attorney General, Environmental Enforcement Section, Office of the Attorney General, State of Ohio, to David Lochbaum, Union of Concerned Scientists.

Date	Activity
	NRC cannot deliberately violate its own safety principles and gain our confidence.[27]
	This speaks directly to Contention No. 1 by Ohio Citizen Action and UCS in this proceeding and more generally to the failure of the NRC to satisfy its goal of improving public confidence by means including consistently effective oversight.

Ohio Citizen Action has also been heavily engaged on the problems at Davis-Besse. Selected highlights of this engagement since the reactor vessel head degradation problems were publicly disclosed in March 2002:

Date	Activity
May 21, 2002	At FirstEnergy's annual stockholders' meeting in Akron, Amy Ryder of Ohio Citizen Action asked senior company officials if they would bring in an independent team to assess conditions at Davis-Besse.[28]
December 13, 2002	Acting upon information obtained from workers at Davis-Besse who did not feel comfortable raising concerns internally or to the NRC, Ohio Citizen Action made a formal allegation to NRC Region III regarding the potential for employees to be impaired due to fatigue from excessive working hours.[29]
January 24, 2003	The efforts of Ohio Citizen Action about Davis-Besse are prominently featured in a PBS NOW with Bill Moyers program segment titled "Close Call." The following Monday, a former worker at Davis-Besse contacted UCS with information to correct a statement made during the broadcast. The former worker informed UCS that NRC inspectors were handed Condition Report 2000-0782 in April 2000 that described boric acid on the reactor vessel head and had seven color photographs (including the now infamous "Red Photo" showing boric acid flowing from the reactor vessel head service platform weep-holes).
March 1, 2003	Amy Ryder of Ohio Citizen Action attends the NRC's monthly public meeting on Davis-Besse and initiates the following exchange regarding the "Red Photo" receipt:
	Amy Ryder: *My name is Amy Ryder. I'm with Ohio Citizen*

[27] Letter dated September 15, 2003, from David Lochbaum, Union of Concerned Scientists, to NRC Chairman Nils J. Diaz and Commissioners Edward McGaffigan, Jr. and Jeffrey S. Merrifield, "Vote of No Confidence in Nuclear Regulatory Commission." [One of the organizations and individuals signing on to this letter was Ohio Citizen Action]

[28] Jon Chavez, *Toledo Blade*, "FirstEnergy says plant could restart by year's end," May 22, 2002.

[29] Letter dated December 13, 2002, from Amy K. Ryder, Ohio Citizen Action, to James Heller, Senior Allegations Coordinator, Nuclear Regulatory Commission, "Allegation by Ohio Citizen Action that Davis-Besse employees are required to work unrealistic work schedules, leaving them unfit-for-duty."

Action. ... There seems to me a lot of mystery as far as when FirstEnergy admits that they actually knew there was a problem, you know, there's no – photographic evidence as early as 1998 showing that there was degradation of the head. There is a lot of he said/she said over whether or not the NRC knew that this evidence existed, you, there's a FirstEnergy employee says I turned over a condition report and photographs to an NRC inspector. The NRC claims, no we never saw it, and I think that's a lot of information ... that's of concern to the public as far as what's being turned over and unfortunately we are finding out a lot of the information from the newspapers and the Union of Concerned Scientists. Page 64, lines 2-25.

John A. Grobe, Chairman of the NRC's 0350 Restart Panel: *It's very easy to make a public statement. It's much more time consuming and difficult to investigate it to find out what the truth is. ... All of the information that David Lochbaum and the Union of Concerned Scientists and others are putting out is information that's coming from us, so its maybe the dissemination channels aren't as effective, but you know, the information is available.* Page 65, line 7 to page 66, line 1

Amy Ryder: *Well, I do know that all of the information that David gets is from the NRC, from ADAMS and from NRC documents, but he spends weeks and weeks and weeks digging through documents to find that information. That is not information that is disclosed and in an avenue that the public can understand, and I am grateful there are David Lochbaums in the world, but form the public's perception, we get the scoop from the newspapers, and we get it from organizations like mine or from the Union of Concerned Scientists, not from FirstEnergy and unfortunately not from the NRC, it comes in a way that we can understand it from them.* Page 66, lines 4-16[30]

October 17, 2003 The information received by UCS following the NOW broadcast was relayed to Congress members who in turn requested an inquiry by the NRC's Office of the Inspector General. The OIG's report stated:

OIG determined that the Senior Resident Inspector, Resident Inspector, and possibly the ISI Inspector reviewed Davis-Besse CR 2000-0782 during 12RFO. These inspectors did not recognize the significance of the boric acid corrosion described in CR 2000-0782. Consequently, the Region III inspectors did not inquire into the Condition Report and did not verify that by

[30] Nuclear Regulatory Commission, Transcript, Meeting held on March 1, 2003, at 7:00 p.m. at Camp Perry, Clubhouse #600, Port Clinton, Ohio.

> *the end of 12RFO, FENOC had cleaned the reactor vessel head and had identified the source of the boric acid leakage.*[31]
>
> But for the engagement of Ohio Citizen Action and UCS, the fact that NRC inspectors were handed graphic, physical evidence on boric acid damage to the reactor vessel head prior to restart from the refueling outage in 2000 and did nothing with and about that information might have remained a secret. Ohio Citizen Action and UCS, through persistent engagement and using tools like allegations and Freedom of Information Act requests, successfully exposed aspects of this matter that the NRC had failed to disclose.

Summary Regarding the Question of Standing

Ohio Citizen Action and UCS have expended considerable and sustained effort over the years calling attention to problems at Davis-Besse, to deficiencies in the performance of both the licensee and the NRC that contributed to the depth and breadth of those problems, and to steps needed to correct those problems and prevent recurrences. Fair and consistent application of the NRC's enforcement policy has been a recurring theme of those efforts.

The past engagement of Ohio Citizen Action and UCS on problems at Davis-Besse and with the NRC's enforcement policy demonstrates that the organizations do not seek participation in this proceeding to "grandstand" or toss a monkey-wrench into the works. Instead, the record demonstrates that participation in this proceeding is consistent with a long track record by the organizations of seeking fair accountability for violations that contributed to the Davis-Besse problems.

The NRC staff counsel asserted during the June 16th conference that the efforts of Ohio Citizen Action and UCS were irrelevant to this proceeding because the efforts were undertaken voluntarily. The basis for such a claim seems to be a total lack of understanding for the mission and purpose of public interest organizations like Ohio Citizen Action and UCS. Ohio Citizen Action is the largest environmental organization in Ohio with 100,000 dues-paying members. For Ohio Citizen Action to "voluntarily" ignore the problems at Davis-Besse and the threat they posed to the environment and public health would antithetical to the organization's reason for being. It simply was not an option. Likewise, UCS as a nuclear safety advocate could not ignore the safety problems at Davis-Besse and the NRC's oversight failures they exposed. To ignore or opt out of pursuing resolution to the Davis-Besse problems and associated NRC oversight failures would be counter to UCS's charter. Quite simply, neither Ohio Citizen Action nor UCS could "voluntarily" neglect Davis-Besse without outraging and likely reducing their memberships.

Ohio Citizen Action and UCS do not contend that our function as a public interest group confers automatic entry into any and all NRC proceedings. A proper test to decide entry would examine whether the organizations have an established track record of action relative to the subject of a

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[31] Nuclear Regulatory Commission Office of the Inspector General, "NRC's Oversight of Davis-Besse Boric Acid Leakage and Corrosion During the April 2000 Refueling Outage," Case No. 03-02S, October 17, 2003.

proceeding so as to create some reasonable expectation of contributing to rather than detracting from the proceeding. Ohio Citizen Action and UCS clearly past this test for this proceeding.

Mr. Siemaszko is represented by capable counsel who will likely be able to get his neck out of the NRC's noose. Ohio Citizen Action and UCS do not seek participation in this proceeding to ensure that rightful outcome – if that were our sole goal, we would offer support directly to Mr. Siemaszko and his counsel and avoid the challenging burden of preparing filings and replies. Ohio Citizen Action and UCS seek participation in this proceeding at the Pane's discretion to strive for a broader goal of identifying the causes for the NRC's biased application of its enforcement policy that results in severe sanctions against lower level employees like Mr. Siemaszko and Ms. VanCleave and light or no sanctions against higher level employees for comparable and more safety significant violations. Participation in this proceeding is just another logical and needed step in the pathway towards fair and consistent implementation of the NRC's enforcement policy.

A final example of how our participation in this proceeding is very likely to benefit the greater good comes from this history. In reviewing conditions at Davis-Besse, UCS identified a potential safety problem. The borated water that had been leaking from the cracked control rod drive mechanism (CRDM) nozzle for years to produce the boric acid that corroded away a large portion of the reactor vessel head also posed another safety hazard. UCS formally notified the NRC that the sustained, slow accumulation of boric acid inside the containment could have compromised the capability of a material (trisodium phosphate dodecahydrate or TSP) placed in containment to control the pH level following an accident.[32] The amount of TSP in containment is controlled by the plant's Technical Specifications and is determined from a calculation that examines how much boric acid is deposited in containment during an accident. UCS pointed out that the calculation, and thus the Technical Specification limit, did not account for the amount of boric acid that might already be inside containment from a small, but sustained leak. The NRC issued generic correspondence to all pressurized water reactor licensees alerting them to this potential problem.[33] The NRC stated:

> *The U.S. Nuclear Regulatory Commission (NRC) is issuing this information notice (IN) to inform addresses of potential adverse effects of boric acid leakage that may not have been previously considered and to reemphasize concerns regarding boric acid accumulations on reactor plant equipment inside containment. The primary concern regarding boric acid leakage is corrosion of ferritic steel components. However, if boric acid deposits of sufficient magnitude are present in containment, dissolution of these deposits may also affect the pH of the reactor coolant in the containment sump.*

UCS called attention to a previously overlooked aspect of the Davis-Besse situation, allowing it to be addressed. This proceeding provides a similar opportunity.

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[32] Letter dated June 24, 2002, from David Lochbaum, Union of Concerned Scientists, to John A. Grobe, Chairman – Davis-Besse 0350 Panel, Nuclear Regulatory Commission, "Formal Allegation of Technical Specification Non-Compliance and Adverse Safety Conditions at Davis-Besse."

[33] Nuclear Regulatory Commission, Information Notice 2004-21, "Additional Adverse Effect of Boric Acid Leakage: Potential Impact on Post-Accident Coolant pH," November 24, 2004.

On the Question of Contentions

On June 7, 2005, the NRC staff responded to the hearing request filed by Ohio Citizen Action and UCS. It is apparent from their response that the NRC staff did not like our contentions. We accept that dislike since it matches our dislike for the inappropriate sanction they proposed for Mr. Andrew Siemaszko.

Regarding Contention No. 1, the NRC staff stated "This contention is inadmissible since petitioners are attempting to litigate the Staff interactions with the License." Staff Response at 11. This is patently untrue. The petitioners are attempting to litigate the Staff interactions with Mr. Siemaszko. The Staff's interactions with the Licensee are history and we do not seek to rewrite history. It is, in fact, the NRC staff that introduced those interactions into this proceeding. It is the NRC staff who stated "Had the NRC been aware of this incomplete and inaccurate information, the NRC would likely have taken immediate regulatory action to shut down the plant and require the licensee to implement appropriate corrective actions." Siemaszko Order at 7. The NRC staff introduced this speculation as the alleged basis for the severity of the sanction they proposed for Mr. Siemaszko. Ohio Citizen Action and UCS rightfully challenge that NRC staff's speculation in the context of this proceeding because ample documentation strongly suggests that this speculation is unfounded. If the Panel finds that the NRC staff's speculation is unfounded, grounds are established for the sanction imposed on Mr. Siemaszko being mitigated or eliminated. Hence, the contention is valid, has merit, and should remain.

Regarding Contention No. 2, the NRC staff seeks to have the Board dismiss our original contention based on the staff's poorly re-worded and misconstrued characterization of the contention. What we said, and not what the NRC staff wishes the Board to think we said, was:

> "Concise statement of alleged facts or expert opinions supporting the requestor's position
> The NRC order to Mr. Andrew Siemaszko is based on the agency's mistaken belief that the subject work order required all boric acid to be removed from the reactor vessel head. However, the work order itself allowed cleaning to be terminated prior to removal of all the boric acid. The steps and provisions of the work order were in fact followed without deviation, including the provision to terminate cleaning with boric acid still remaining on the head. Thus, the paperwork accurately reflect both the work required and the work performed." Hearing Request at 10

Our Contention No. 2 disputes the central issue in the NRC's proposed sanction against Mr. Siemaszko – that the information he recorded on the Condition Report and Work Order was incomplete and inaccurate. Hence, the contention is valid, has merit, and should remain.

Regarding Contention No. 3, Ohio Citizen Action and UCS contend that in many past enforcement cases, the NRC staff has not taken action against individuals who violated the agency's regulations because the NRC did not determine that the individuals know the actions being taken violated regulations. Contrary to the staff's notion that our challenge "seeks to take issue with broader issues of the Staff enforcement policy," (Staff Response at 14) we accept the enforcement policy as-is and instead challenge the inconsistent implementation of that unchallenged enforcement policy. In this instant case, the NRC staff did not make a determination that Mr. Siemaszko knew about the requirements of 10 CFR 50.9 and therefore

knowingly violated them. In past cases involving the same enforcement policy, the NRC staff made such determinations and used such determinations to inform its decisions. This contention seeks to challenge the NRC staff's lack of similar determination in this case. Hence, the contention is valid, has merit, and should remain.

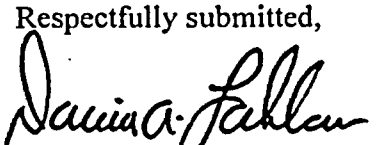
Regarding Contention No. 4, Ohio Citizen Action and UCS agree with the NRC Staff's response (Staff Response at 14) and withdraw this contention.

Regarding Contention No. 5, the NRC staff has, again, misconstrued our contention. The NRC staff responded, "In this contention petitioners are arguing that the Staff should have taken a different enforcement approach. It is well established that one cannot seek to intervene in an enforcement proceeding to have NRC impose a different penalty than what the NRC seeks." Staff Response at 15. It is simply and plainly not what we are seeking with this contention. It is true that we pointed to others with equal or greater responsibility for the problems at Davis-Besse, but we did so in the context, and proper context we hasten to emphasize, of the NRC staff being wrong to sanction only Mr. Siemaszko. As we pointed out during the June 16th conference call, our focus is like that where a law exists on the books but law enforcement officers only arrest green people for violating it when people of all colors are also violating it right and left. In this proceeding, we are contesting the NRC's effort to sanction Mr. Siemaszko and only Mr. Siemaszko for violations when the record is abundantly clear that he cannot be the only person responsible. We fully understand that a direct outcome of this proceeding cannot be NRC sanctions against others. We can and will pursue other channels for that justice. But this proceeding is the only proper venue for contesting the unfair, biased singling out of poor Mr. Siemaszko for the entirely of the NRC's individual sanctions. Hence, this contention is valid, has merit, and should remain.

Conclusion

For the reasons described above, Ohio Citizen Action and the Union of Concerned Scientists warrant standing in this proceeding and Contentions 1, 2, 3, and 5 should be admitted.

Respectfully submitted,



David A. Lochbaum
Pro Se Representative for Ohio Citizen Action and UCS

Dated at Washington, DC this 24th day of June 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
E. Roy Hawkens
Dr. Peter S. Lam

In the Matter of	Docket No. IA-05-021
ANDREW SIEMASZKO	ASLBP No. 05-839-02-EA
	June 24, 2005

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "REPLY OF OHIO CITIZEN ACTION AND UNION OF CONCERNED SCIENTISTS TO NRC STAFF RESPONSE TO HEARING REQUEST" were served this 24th day of June, 2005, on the following persons by deposit in the United States mail and by electronic mail.

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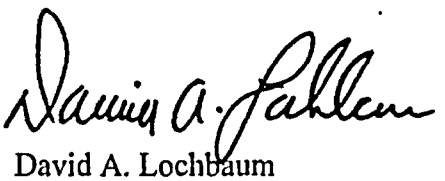

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