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NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

ANDREW SIEMASZKO'S REPLY TO NRC STAFF OPPOSITION TO PETITIONS TO INTERVENE BY THE UNION OF CONCERNED SCIENTISTS AND OHIO CITIZEN'S ACTION

The fundamental issue to be decided by the Atomic Safety and Licensing Board ("ASLB") is whether the request to intervene of the Ohio Citizens Action and the Union of Concerned Scientists ("Petitioners") should be granted, which requires the ASLB to determine whether the organizations have established legal standing to join the proceeding, and if so, an admissible contention for the ASLB's consideration.

FACTS

The basic facts involved in this proceeding are not in controversy. Mr. Andrew Siemaszko was a system engineer at the Davis-Besse nuclear power plant operated by FirstEnergy Nuclear Operating Company (FENOC) from July, 1999 until his termination in September, 2002. Mr. Siemaszko and other systems engineers before him, not FENOC

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management, identified a concern about the existence of excessive boric acid on the head of the reactor and devised a plan to clean it during the 12th Refueling Outage (12 RFO) in the spring of 2000. Although cleaning the head of the reactor was not even included in the original outage schedule work planning, Mr. Siemaszko convinced upper management to give him a chance to clean it. He undertook those activities with the full intention of completely cleaning the head; but as a result of the extensive build-up of the boric acid and the inability to access the center of the reactor head with appropriate tools, management stopped his clean-up activities. The boric acid was not completely removed, although all leaking CRDM flanges were repaired. As a result of the aborted cleaning efforts, management told Mr. Siemaszko that he could plan for the complete removal of boric acid from the entire head during 13 RFO, which he did. There was full knowledge and awareness of the state of the cleaning, the existence of boric acid on the head of the reactor, and the lack of completion of the cleaning exercise, by his management chain, the outage management team, corporate management, and the NRC.

Notwithstanding the pre-outage good faith intention to clean the head entirely, or post outage plan to complete the job during 13 RFO, and unbeknownst to anyone, a dangerous cavity in the reactor head continued to develop, undetected, for the next twenty months. When discovered, all operations came to a halt. Numerous investigations and inspections and reviews were conducted about how this could have happened. The result, thus, has been for the NRC Staff to, essentially, place the blame for the entire situation on the shoulders of one systems engineer, employed at Davis Besse for less than a year at the time of the relevant events during 12 RFO.

The Staff's action in proposing to prohibit Mr. Siemaszko's involvement in NRC-licensed activities is based on a convoluted attempt to portray Mr. Siemaszko as the mastermind and extraordinary manipulator who was able to create a deception to his own management about the existence of the remaining boric acid, succeed at it, and also thereby deceive the NRC.

Mr. Siemaszko asserts that the facts supporting the enforcement action are simply not true and that the action should be dismissed. Of course, even if the Board were to find some level of complicity for Mr. Siemaszko, the proposed punishment of a five year total ban from the industry and another five years of notice of any employment within the industry, is far too harsh and does not comport in any way with the historical action taken against others involved in this debacle, or other actions the NRC has taken or declined to take.

Mr. Siemaszko Supports The Petition To Intervene

Two organizations have served the public interest by providing independent oversight on the Davis Besse issues, and now seek to intervene in the Enforcement Action case. Mr. Siemasko supports their entry into the case, welcomes the addition of their perspective and background on this matter, and believes that their involvement will assist the Board in the development of a complete record in this case.

OCA is the state of Ohio's largest environmental organization. It found itself extremely involved in the public oversight and accountability of the NRC in connection with the assessment of what went wrong and why. The UCS is a well respected and highly regarded nonprofit organization that leads the public debate on issues of importance and significance in, among other things, nuclear power oversight. Both organizations have members that live within the shadow of Davis-Besse. UCS has invested large amounts of finances beyond their annual budget

in order to provide the Department of Justice and the NRC with what they believed to be violations of federal regulations regarding FENOC and their operation at Davis-Besse. The representative of UCS, Mr. David Lochbaum, is a nuclear engineer with substantial experience in the field and has, in all likelihood, developed the best understanding of the facts leading to the near miss of anyone outside of the participants. His perspective in the case will be invaluable.

The organizations have both developed a substantial body of knowledge about the event, the position and explanations of what happened and why, and for obvious reasons are in a unique position to provide the Board a different perspective on the issue than the Staff or Mr. Siemaszko. Mr. Siemaszko recognizes that, at times, UCS and OCA may actually take positions on issues before the Board that appear to be contrary to his own interests. However, he recognizes the significance of the near miss that he was involved in and believes that the full development of the facts on the record is the best defense to the Staff's case against him.

For these reasons, and the legal arguments advanced below and by UCS and OCA's, Mr. Siemaszko supports the addition of the Petitioners as Intervenors.

STANDING

Pursuant to 10 C.F.R § 2.309(d), in ruling on a request for intervention, a Licensing Board is to determine whether the petitioner has an interest affected by considering (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest. The Commission has the authority to define the scope of a proceeding. *Bellotti v. NRC,*

725 F.2d 1380, 1382 (D.C. Cir. 1983). The Commission has long applied judicial concepts of standing. *Cleveland Electric Illuminating Co.*, 38 NRC 87, 92 (1983). An organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members. *Warth v. Selding*, 422 U.D. 490, 511 (1975). The injury may be actual or threatened. *Kelly v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995). Though the petitioner must demonstrate standing, the ASLB shall "construe the petition in favor of the petitioner." *Kelly v. Selin*, 42 F.3d at 1508. In order to determine whether a petitioner, under *Bellotti*, has standing in an enforcement proceeding, the Commission in *Maine Yankee* developed the following questions: (1) would the petitioner be better off if the order were vacated?; (2) would the petitioner's concerns be alleviated if the order were vacated?; and (3) does the petitioner in reality seek additional measures beyond those set out in the disputed order? *Maine Yankee*, 59 NRC 52, 60 (2004).

Ohio Citizen Action (OCA) and the Union of Concerned Scientists (UCS) have met the standard needed for standing. Both, OCA and UCS have met the requirements necessary to have standing in an enforcement proceeding developed by the Commission in *Maine Yankee*. In the Reply of Ohio Citizen Action and Union of Concerned Scientists To NRC Staff Response to Hearing Request, filed today, June 24, 2005, the Petitioners set forth a detailed summary of their interests and contributions.

As well articulated, in the Petitioner's Reply brief, the issue of public confidence stems from the regulator's ability to provide a full and fair oversight process for its actions. In this case, OCA and UCS would be better off if the Order were vacated as to Mr. Siemaszko, because it would deny the NRC staff the ability to unfairly and inaccurately avoid its own accountability

and that of others far more involved in the events that led to this near miss. As described, the order itself creates a false impression within the members of both organizations that individuals on the bottom end of a hierarchy can be used as scapegoats for the actions of a large number of individuals. In implementing enforcement actions that lack consistency such as Mr. Siemaszko's, the NRC is undermining efforts made by both OCA and UCS to ensure the effectiveness and ability of the NRC's oversight capability in the eyes and minds of their members.

Obviously, if the NRC were to vacate the enforcement order against Mr. Siemaszko, both OCA and UCS would have their concerns alleviated because it would send the message to the members of both organizations that their time and money have not been wasted in hopes of maintaining consistency in the industry. In reality, OCA and UCS do not seek any additional measure beyond those set out in the disputed order. They are simply asking for an enforcement order, which is not supported by the facts as shown in Contention 2 of the petitioner's request, to be vacated in order to produce and maintain consistency for members of their organizations. Therefore, by meeting the above questions, under the guidelines set forth by *Maine Yankee*, the petitioners have met standing to intervene in Mr. Siemaszko's hearing.

UCS met the second element by showing that because of apparent violations at Davis-Besse, the UCS has invested funds to, in essence, do the Staff's job in evaluating the facts to create an accurate record. They retained legal counsel in order to deal with evaluating the potential criminal conduct of persons who placed the public at a significant risk from an unresolved nuclear safety issue that UCS itself had identified. The lessons to be learned from an adjudicatory hearing on what really happened, and didn't, and why, will substantially impact the

manner in which the Staff performs its work and will, in and of itself, contribute to the public health and safety and the public confidence in the NRC's ability to protect the public.

Finally, UCS and OCA have clearly articulated that they do not seek additional measures beyond the proposed action. They seek to demonstrate that the facts do not support the action against Mr. Siemaszko, or that if upheld, that the proposed action is inconsistent with and more harsh then other enforcement actions taken by the NRC. The UCS and OCA have shown evidence that misguided enforcement action creates a real threat of injury to the NRC's oversight capability in terms of worker and public confidence. Specifically, the UCS and OCA correctly point out that the focus of this enforcement action on Mr. Siemaszko solely allows for others, who played greater roles in problems at Davis-Besse, to remain involved in the nuclear industry and make decisions that could once again create the threat that was evident at Davis-Besse.

CONTENTIONS

Pursuant to 10 C.F.R. § 2.309(a), in order to intervene in a proceeding, in addition to establishing standing, a petitioner must also set forth at least one admissible contention. In accordance with 10 C.F.R. § 2.309(f) (1), a contention must: (1) provide a specific statement of the issue of law or fact to be raised or controverted; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on

the issue; and (6) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact which must either include (a) references to specific portions of the safety report that the petitioner disputes and the supporting reasons why or (b) if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

UCS has set forth five specific contentions[1], and provided support for each in their well documented petition to intervene. Mr. Siemasko supports the inclusion of the four remaining contentions; however, points out that specifically Contentions 2 and 3 meet the legal standard for permissible contentions in an enforcement proceeding such as this. See Generally *Bellotti,* 725 F.2d 1380. Clearly, at a minimum these contentions raise the penultimate issue of whether the proposed enforcement order against Mr. Siemaszko is supported by the evidence.

On each of the contentions, OCA and UCS have provided a substantial recitation of the relevant record supporting their contention that the facts do not support the Staff's conclusion that Mr. Siemaszko provided incomplete and inaccurate information in Condition Report No. 2000-1037 and/or Work Order No. 00-001846-000.

The OCA and UCS have also clearly shown that these factual conclusions about what the NRC Staff knew or should have known during the 2000 to 2002 time frame about the condition of the Davis-Besse reactor head is critical to a determination of the charge against Mr. Siemaszko.

[1] Pursuant to the Reply filed today, June 24, 2005, the Petitioners have withdrawn Contention Number 4.

After meeting all the requirements in 10 C.F.R. § 2.309(f) (1), Ohio Citizen Action and the Union of Concerned Scientists should have at least two of its proposed contentions admitted during the proceeding.

CONCLUSION

Ohio Citizen Action and the Union of Concerned Scientists have provided the support necessary to establish standing in order to intervene in Mr. Siemaszko's hearing, and proposed viable contentions Mr. Siemaszko supports the intervention and believes that both OCA and UCS will provide information helpful to the ASLB in considering the issues in the case and restoring public confidence in the regulatory process.

For these reasons, Mr. Siemaszko urges that the ASLB grant the Petition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Andrew Siemaszko's Reply to NRC Staff Opposition to Petitions to Intervene by the Union of Concerned Scientists and Ohio Citizen's Action were served this 24th day of June, 2005, by the means indicated (electronic mail *; regular U.S. Mail **; facsimile ***; messenger ****), on the following:

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