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NUCLEAR REGULATORY COMMISSION

Title: Pre-Hearing Conference ITMO
Andrew Siemaszko

Docket Number: IA-05-021

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD (ASLAB)

5 PRE-HEARING CONFERENCE

6
7
8 IN THE MATTER OF: ||

9 ANDREW SIEMASZKO ||

Docket No. IA-05-021

10 (Enforcement Action) ||
11

12 Thursday

13 June 16, 2005
14

15 The pre-hearing teleconference came to
16 order at 2:00 p.m., EDT, the Honorable LAWRENCE G.
17 McDADE, presiding.
18

19 BEFORE:

20 LAWRENCE G. McDADE, Administrative Judge, Chair

21 E. ROY HAWKENS, Administrative Judge

22 PETER LAM, Administrative Judge
23
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1 APPEARANCES:

2 On Behalf of the Nuclear Regulatory Commission:

3 SARA E. BROCK, ESQ.; and

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9 On Behalf of Andrew Siemaszko:

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11 JOHN CLIFFORD, ESQ.

12 of: Clifford & Garde

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15 Washington, D.C. 20036

16 ALSO PRESENT:

17 DAVID LOCHBAUM, Union of Concerned Scientists

18 JOHN MANGLESON, Cleveland Plain Dealer

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P-R-O-C-E-E-D-I-N-G-S

(2:11 p.m.)

CHIEF JUDGE McDADE: My name is Lawrence McDade. I'm the chairman of the panel to which this matter has been assigned for adjudication. With me are Dr. E. Roy Hawken and Judge Peter S. Lam, who are the other two judges on the panel. Also present here is Jonathan Rund, a law clerk, and Karen Vallic, who is an administrative assistant to the Board.

We are here in the matter of Andrew Siemaszko. It is ASLBP number 05-839-02-ES. Would the representatives of the Nuclear Regulatory Commission staff please identify themselves for the record?

MS. BROCK: Yes, Sara Brock and Melissa Duffy on behalf of the NRC staff.

CHIEF JUDGE McDADE: And the representatives of Mr. Siemaszko?

MS. GARDE: Your Honor, this is Billie Garde. That's B-i-l-l-i-e G-a-r-d-e for the court reporter. And with me is my law partner, John Clifford, C-l-i-f-f-o-r-d; and the law clerk working with us on this case, Pasha Eatedali, E-a-t-e-d-a-l-i. And we're in our office in downtown Washington.

CHIEF JUDGE McDADE: Is Mr. Siemaszko on

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1 the line?

2 MS. GARDE: He is not.

3 CHIEF JUDGE McDADE: Okay. He understands
4 that he could be if he wished?

5 MS. GARDE: Yes.

6 CHIEF JUDGE McDADE: He is willing to
7 waive his presence for this pre-hearing conference?

8 MS. GARDE: Yes, Your Honor. If I need to
9 submit something in writing to that effect, I'll be
10 glad to do that. He is at work and unable to
11 participate.

12 CHIEF JUDGE McDADE: Okay. You're stating
13 it on the record. This is being transcribed. So that
14 will suffice just as long as it is clear that you have
15 explained to your client that he has a right to be
16 present and participate in any hearing in this matter,
17 that he is aware of that, and that he waives his
18 presence and his participation in this pre-hearing
19 conference. Is that correct?

20 MS. GARDE: Yes, Your Honor.

21 CHIEF JUDGE McDADE: Now, there is also a
22 representative from Union of Concerned Scientists?
23 Sir, are you on?

24 MR. LOCHBAUM: Yes. That's correct. My
25 name is David Lochbaum, L-o-c-h-b-a-u-m, with the

1 Union of Concerned Scientists.

2 CHIEF JUDGE McDADE: I believe that is all
3 of the parties who are going to participate in this
4 particular pre-hearing conference.

5 The court reporter asked correctly -- and
6 I will reiterate -- given the fact that this is being
7 done by telephone and the court reporter does not have
8 the benefit of visuals, it would be helpful if when we
9 do speak during the course of this, if we introduce
10 ourselves by name so that the court reporter will be
11 able to accurately attribute statements to the
12 appropriate person.

13 The first issue that I wanted to take up
14 today has to do with the proposed intervention. And
15 I want to give the Union of Concerned Scientists an
16 opportunity, first of all, to offer anything further
17 orally that they wish to supplement their written
18 submissions with regard to their standing and also the
19 contentions and then also have various questions of
20 them to help the Board in its decision-making process
21 with regard to the proposed intervention.

22 After we hear from them, I would then want
23 to hear from the NRC staff with regard to their
24 position on intervention to see if they had anything
25 further to add, to either agree or disagree with

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1 things that were said by the representative of the
2 Union of Concerned Scientists and then to give the
3 representatives of Mr. Siemaszko an opportunity to be
4 heard on this issue as well.

5 Is there any problem with that procedure
6 to start today?

7 MR. LOCHBAUM: No, sir.

8 MS. GARDE: No, sir.

9 MS. DUFFY: This is Melissa Duffy
10 representing the NRC staff. And we would just like to
11 make a particular note that neither the Union of
12 Concerned Scientists or Ohio Citizen Action replied to
13 our response.

14 And, furthermore, Ms. Billie Garde did not
15 file a response to their hearing request, as she could
16 have pursuant to 2.309.

17 CHIEF JUDGE McDADE: And in those
18 instances, that submission was permissible but not
19 required. Before we proceed, Mr. Lochbaum, would you
20 like to say anything or would you like just to have us
21 start asking you questions?

22 MR. LOCHBAUM: This is Dave Lochbaum. I
23 would just like to start with a very brief explanation
24 for what the NRC staff just pointed out. I thought
25 the 90-day clock was still running. The enforcement

1 action provided interested parties up to 90 days or I
2 think it was 90 days to express an interest to weigh
3 in on this matter. I thought that clock was still
4 running.

5 So my response to the NRC's motion was
6 going to wait to see if there was anybody else who
7 weighed in on this matter. So that explains why we
8 have not answered or responded to the NRC's staff's
9 motion.

10 As far as standing, some of the things we
11 were going to respond to were to point out that the
12 organization has monitored NRC enforcement actions
13 over a long period of time, not just this instant
14 case.

15 And, therefore, we can bring to this
16 proceeding the perspective of whether this individual
17 action is consistent with or inconsistent with NRC
18 enforcement actions taken for similar infractions in
19 the past. That's what we think the value of our
20 participation in this proceeding is, to provide those
21 kinds of insights that we have acquired over years of
22 working with or monitoring the NRC's actions.

23 That's all I wanted to add to the written
24 filing we've made.

25 CHIEF JUDGE McDADE: Okay. Under normal

1 circumstances, you would be given ten days after the
2 staff's reply to respond. That actual ten days would
3 be today. The first question would be, do you wish to
4 make a written reply?

5 And then my question would be to the staff
6 what their position is and then to Mr. Siemaszko what
7 his position would be with regard to that.

8 Having read the staff's reply dated June
9 6, do you wish to file anything in writing?

10 MR. LOCHBAUM: This is Dave Lochbaum. It
11 was our intent to reply to the staff's motion. I
12 apologize for not realizing the ten-day part. Again,
13 as I said earlier, I thought the 90-day clock was
14 still running. And that was longer than the time to
15 today. So that may have been my misperception, but
16 that was why we haven't responded thus far.

17 CHIEF JUDGE McDADE: But the question at
18 this point is, do you wish to respond in writing?

19 MR. LOCHBAUM: This is Dave Lochbaum.
20 Yes, we do.

21 CHIEF JUDGE McDADE: What is the staff's
22 position on that? Would you have any objection to my
23 granting them a short period of time within which to
24 file a written response? Ms. Duffy?

25 MS. DUFFY: One minute, please. May I

1 have a moment to confer briefly?

2 CHIEF JUDGE McDADE: Surely.

3 MS. DUFFY: Thanks.

4 (Pause.)

5 MS. DUFFY: This is Melissa Duffy with the
6 NRC staff. If Mr. Lochbaum would like to wait until
7 the end of the 90-day intervention period, that's fine
8 with us.

9 In that case, we would prefer to delay our
10 oral argument on this matter until he has submitted
11 his written reply.

12 CHIEF JUDGE McDADE: Okay. He may be
13 willing to wait until the end of the 90 days, but I
14 don't think the Board is. What I was thinking was
15 perhaps a week, allowing until -- today is Thursday --
16 allowing until next Thursday for them to reply.

17 And what I would like to do is regardless
18 if they're going to apply orally or not, rather than
19 wasting much of today's time, I would like to hear
20 from the parties orally and allow all of the parties
21 basically the ability to file simultaneous briefs next
22 week.

23 You know, they can file a reply if
24 anything comes up at this particular hearing that you
25 think needs additional clarification, either from the

1 NRC staff or from the standpoint of Mr. Siemaszko, on
2 this point to allow all three of you to file a
3 simultaneous brief by the end of next week. And that
4 way we will be able to move expeditiously to resolving
5 this.

6 Do you have any objection to that, Mr.
7 Lochbaum.

8 MR. LOCHBAUM: This is Dave Lochbaum. No.
9 That would be fine for us. We would be glad to
10 provide our written reply in tghat time.

11 CHIEF JUDGE McDADE: Ms. Duffy?

12 MS. DUFFY: The NRC staff has no
13 objection.

14 CHIEF JUDGE McDADE: For Mr. Siemaszko?

15 MS. GARDE: No objections, Your Honor.

16 CHIEF JUDGE McDADE: Should I just address
17 my questions to you, Ms. Garde, or should I just open
18 it up for counsel for Mr. Siemaszko and let whichever
19 one of you who happens to chime in chime in?

20 MS. GARDE: I think that would be fine,
21 Your Honor. Just counsel for Mr. Siemaszko, and one
22 of us will reply.

23 CHIEF JUDGE McDADE: Okay. Some questions
24 specifically for the putative intervener here. As I
25 understand the options of the Board given what we have

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1 been charged to do in this particular proceeding, we
2 could make a finding of fact that the allegations are
3 correct that there was an intentional violation and
4 uphold the order; we could find an intentional
5 violation but mitigate the sanction; or we could
6 overturn the order, saying that the staff had not met
7 its burden of proof.

8 Given that as the options, the scope of
9 this particular proceeding, do you view the scope of
10 the proceeding differently than that? And if that's
11 the scope, how was our interest affected by these
12 options? Aren't you in the same position, no matter
13 which of those three we take?

14 MR. LOCHBAUM: This is Dave Lochbaum for
15 UCS. I agree with the scope and the three options.
16 As far as how our interests are affected by that, an
17 important component of the NRC's oversight
18 responsibilities is enforcement. This is clearly an
19 enforcement case, and those three options deal with
20 enforcement sanctions.

21 Improper or for the NRC staff to come to
22 the wrong enforcement decision undermines the NRC's
23 oversight responsibilities in this case. And it also
24 makes it less effective down the road, which is our
25 biggest concern, which is ineffective oversight caused

1 by the wrong application of the enforcement policy in
2 this case and left uncorrected down the road.

3 So that our organization is concerned
4 about that implication as well as correcting the wrong
5 done in this individual case.

6 CHIEF JUDGE McDADE: As I read your papers
7 -- and Judge Hawkens and Judge Lam can jump in here if
8 they need further clarification. As I read the
9 papers, I came away with the impression that what you
10 were saying is basically that Mr. Siemaszko was de
11 facto a scapegoat in this, that there were other
12 individuals responsible and other individuals more
13 responsible and because of that, the proposed sanction
14 against Mr. Siemaszko, if any sanction should be
15 imposed, was inappropriate.

16 Given the fact that we have no authority
17 to include sanctions against anybody else but can only
18 deal, again, specifically with the factual issue with
19 Mr. Siemaszko, did he commit a deliberate violation
20 and if so, is the penalty to him appropriate or
21 inappropriate, how is your interest affected by
22 anything that we can do in this proceeding?

23 MR. LOCHBAUM: This is Dave Lochbaum. In
24 our filing, your understanding of our message or our
25 intent is correct with the exception that we also

1 don't believe that the NRC staff made a strong enough
2 case that Mr. Siemaszko did the crimes or did the
3 violation that he was accused of. We don't believe
4 the NRC made that standing.

5 Left unchecked, the perception that this
6 could leave for workers around the country is to not
7 report safety problems that they are aware of if they
8 even played a minor role or a perception might be that
9 they played a minor role in those violations because
10 this case will send a message to those workers that
11 they can be singled out by the NRC and held
12 accountable, despite the fact that many others may
13 have been more to blame for those problems.

14 So an action by the NRC that had the
15 unintended consequences of silencing workers who know
16 about safety issues is clearly not in the best
17 interest of our organization or the NRC.

18 CHIEF JUDGE McDADE: Okay. When you say,
19 "not in the best interest of" our "organization," the
20 NRC case law indicates that for standing, there has to
21 be an injury, in fact, not just an academic interest
22 or an interest in sort of good public policy.

23 How do you get over that hurdle? Is that
24 a correct understanding of what the NRC case law in
25 this area has for standing? And if so, how do you get

1 over that hurdle that this isn't just an academic
2 interest but, in fact, that your organization would
3 suffer injury, in fact, as a result of our action
4 here?

5 MR. LOCHBAUM: This is Dave Lochbaum. I
6 can't question your interpretation of case law because
7 I don't know the case law, but I assume it's correct.

8 As far as getting over that hurdle, my
9 understanding was that organizational standing
10 permitted a group like ours to participate in a
11 proceeding when there was a chance for a precedent to
12 be set that would be damaging to the goals of the
13 organization.

14 Our goal is safe nuclear power. We have
15 worked on that for 30 years, have spent considerable
16 capital in terms of money and time in achieving that
17 goal.

18 And this case if your panel rules that the
19 NRC can indeed single out an innocent person and
20 sanction him would seriously undermine our efforts to
21 achieve safe nuclear power. So can you put a dollar
22 value on that? Yes. I would say that the amount of
23 time and money we have spent working against that
24 outcome would indeed be an outcome?

25 In addition, the egregiousness of the

1 NRC's actions in silencing future workers would mean
2 we would probably have to spend much more money down
3 the road trying to undo the damage done by this NRC
4 staff action. So I think that's how we would address
5 that standard or that criterion.

6 CHIEF JUDGE McDADE: Judge Lam, did you
7 have a question?

8 JUDGE LAM: Yes. This is Judge Lam. Mr.
9 Lochbaum, I understand your concern about nuclear
10 safety. But, to go back to what Judge McDade earlier
11 said, our authorities are limited in this particular
12 proceeding. Have you considered talking to the NRC
13 staff about if this is not the right venue for you to
14 express your concern?

15 MR. LOCHBAUM: This is Dave Lochbaum. We
16 have. During my eight-plus years at the Union of
17 Concerned Scientists, I have met repeatedly with the
18 Director of Enforcement and other NRC staffers about
19 our concerns on the enforcement policy. In those
20 informal meetings and forms, there's no ability to
21 really effect change. Our concerns are taken in,
22 given a number, put into ADAMS without ever being
23 addressed.

24 This is a legal proceeding, which
25 hopefully because it is a more formal proceeding can

1 get to an outcome where the NRC can't just simply
2 patronize our concerns, dismiss our concerns, shelve
3 our concerns, or the other things they've done with
4 our concerns over the years.

5 In our filing, we cited a number of
6 reports and letters and contacts we have had with the
7 NRC staff attempting to achieve that outcome that you
8 have outlined. Those have been unsuccessful. We look
9 at this proceeding as a way to finally draw the NRC
10 staff out, question the inappropriateness of their
11 actions, and correct that one and for all.

12 JUDGE LAM: Thank you for providing the
13 background.

14 MR. LOCHBAUM: Thank you.

15 JUDGE HAWKENS: Mr. Lochbaum, this is
16 Judge Hawken. I have a question similar to the one
17 Judge McDade asked but coming in a little different
18 direction.

19 As I understand it, your concern is with
20 nuclear safety, fairness, and consistency in
21 enforcement action. Those are legitimate concerns,
22 but it seems to me those are concerns which are shared
23 by every citizen in this nation.

24 And if that is adequate to provide
25 standing, how do we draw a line? What would prevent

1 any citizen throughout the nation from participating
2 as a party?

3 MR. LOCHBAUM: This is Dave Lochbaum. I
4 think part of that, where you draw the line, is
5 choice. There was a public notice. Every citizen in
6 the country who shared in those same concerns had the
7 opportunity to avail themselves of the opportunity to
8 weigh in and get that matter corrected, spend the
9 capital. You know, this is not free for us. But we
10 chose to do that. We developed what we thought was a
11 thoughtful, constructive contribution to this
12 proceeding.

13 So in some respects, we feel that it's
14 more the contentions that we've raised, if they have
15 merit or not, that should determine whether we are a
16 party to this proceeding or not, not so much whether
17 I live within eyesight of the cooling towers or some
18 of the other criteria that have been established.

19 JUDGE HAWKENS: Under your theory, then,
20 any citizen who timely responded and requested to
21 participate should be allowed to participate as a
22 party?

23 MR. LOCHBAUM: This is Dave Lochbaum. Yes
24 but with the exception that I did stress that it's the
25 technical contentions that are raised if --

1 JUDGE HAWKENS: I understand, but I'm
2 talking about standing, as opposed to the
3 admissibility of the contentions.

4 MR. LOCHBAUM: This is Dave Lochbaum. I
5 guess I would agree with that. That's correct.

6 JUDGE HAWKENS: Thank you.

7 CHIEF JUDGE McDADE: Okay. This is Judge
8 McDade again. With regard to the actual facts in
9 issue in this particular case -- and, Ms. Duffy,
10 correct me if I am misstating what the NRC's position
11 is -- the factual issue is whether or not Mr.
12 Siemaszko knowingly made a materially false statement
13 in a matter within the jurisdiction of the NRC. Is
14 that the underlying factual issue here?

15 MS. DUFFY: Your Honor, this is Melissa
16 Duffy with the NRC staff. It is not knowingly made a
17 material misstatement but whether he made a material
18 misstatement.

19 CHIEF JUDGE McDADE: It would not have to
20 be in your view an intentional -- in other words,
21 would negligence be enough?

22 MS. DUFFY: No. The language of the
23 regulation under part 50.5, "Deliberate Misconduct,"
24 "engage in deliberate misconduct that causes or would
25 have caused" and then "deliberately submit to the NRC

1 information that the person submitting the information
2 knows to be incomplete or inaccurate and in some
3 respects material to the NRC."

4 CHIEF JUDGE McDADE: So he would have to
5 know that the statement was false?

6 MS. DUFFY: Yes.

7 CHIEF JUDGE McDADE: And it would have to
8 be of consequence; in other words, it had the capacity
9 to effect agency action?

10 MS. DUFFY: Yes.

11 CHIEF JUDGE McDADE: From the standpoint
12 of Concerned Scientists, no matter what we find on
13 this, how are you affected?

14 MR. LOCHBAUM: This is Dave Lochbaum. I
15 appreciate the question because it speaks to an issue
16 that is of deep concern to us in that the NRC is
17 applying basically an arbitrary and capricious
18 standard.

19 We have in the report, the April -- I
20 forget the year. In the report cited in our filing
21 about NRC enforcement sanctions, time and time again
22 the NRC has let managers go after finding that they
23 provided inaccurate and incomplete information to the
24 NRC or other sanctions because the NRC found that the
25 person didn't know that was against the regulations.

1 And, therefore, they allowed the person to get away
2 without any sanctions whatsoever.

3 In this case, in a very rare case, they're
4 going after poor Andrew Siemaszko without determining
5 whether he knew what he was doing was wrong, without
6 applying that standard. They're singling him out,
7 scapegoating, to use your word, for the Davis-Besse
8 problems when time and time and time again this agency
9 has looked the other way and said that the culprits
10 simply didn't know that what they were doing was
11 illegal or against the regulations. They are not
12 applying that standard here.

13 We are trying to get that addressed so
14 whatever the approach taken by the NRC staff is, it's
15 consistent, and it's fairly applied. We're trying to
16 correct that deficiency.

17 Left uncorrected, we are going to continue
18 to see problems down the road because the NRC's
19 enforcement policy is not bringing about the industry
20 performance that it wants to have.

21 CHIEF JUDGE McDADE: Okay. This is
22 Lawrence McDade again. Just as an aside, the
23 scapegoat was not my word. That was from your
24 submission.

25 What I would like to do is to ask the NRC

1 staff at this point in time, starting with the premise
2 that I raised, which is we would need to make a
3 determination as to whether or not there was
4 deliberate misconduct; whether or not Mr. Siemaszko
5 made, intentionally made, a false statement that was
6 material, that was of consequence, that had the
7 capacity to affect agency action, assume we made that
8 finding of fact, would the issues raised by Concerned
9 Scientists, namely that he was being treated
10 differently than other people similarly situated be a
11 relevant factor for us to consider in determining
12 whether or not a punishment should be mitigated? And
13 is that enough to get concerned citizens in the door?

14 MS. DUFFY: This is Melissa Duffy for NRC
15 staff. No, that would not be relevant because those
16 issues go to the matter of NRC's staff enforcement
17 policy, which falls outside the scope of this hearing.

18 CHIEF JUDGE McDADE: But if we were to
19 determine that in similar circumstances, people
20 similarly situated were given no punishment or given
21 short periods of suspension and that here this
22 individual as given a five-year period, would that not
23 be relevant in our determination as to not whether
24 there was a violation but as to whether the sanction
25 was appropriate?

1 MS. DUFFY: No.

2 CHIEF JUDGE McDADE: Why not?

3 MS. DUFFY: May I have a moment to confer
4 briefly?

5 CHIEF JUDGE McDADE: Sure.

6 MS. DUFFY: Thank you.

7 (Pause.)

8 MS. DUFFY: No because it wouldn't give
9 the Union of Concerned Scientists standing and it
10 doesn't establish their interest in the proceedings.

11 JUDGE LAM: This is Judge Lam. Ms. Duffy,
12 let me follow up with Judge McDade's question. I
13 mean, assuming what you said is true that the Union of
14 Concerned Scientists should not even come in but the
15 scenario, the judgment they posed was that there were
16 inconsistencies -- this is an assumption. Assuming
17 there were inconsistencies in the staff's enforcement
18 policy, should that not be a factor in our decision on
19 mitigating the sentence?

20 (Pause.)

21 JUDGE LAM: Ms. Duffy, are you there?

22 MS. DUFFY: Yes. Can I have one more
23 second to confer?

24 JUDGE LAM: Sure.

25 (Pause.)

1 MS. DUFFY: This is Melissa Duffy. It's
2 still the policy of the NRC staff that it would not be
3 relevant because any mitigation would still need to be
4 in accordance with the NRC enforcement policy.

5 CHIEF JUDGE McDADE: Okay. I don't have
6 any other further questions of Concerned Scientists at
7 this point. Judge Lam, do you? Judge Hawkens? Ms.
8 Duffy, do you have anything further in reply to
9 anything Concerned Scientists has said or the
10 questions that we have asked that you would like to
11 comment on?

12 MS. DUFFY: Yes. The NRC staff would like
13 to emphasize the fact that the Union of Concerned
14 Scientists needs standing and not just technical
15 contentions. And they have not established that they
16 have standing to participate in this proceeding.

17 The interests that they have asserted and
18 broad and diffuse. Their generalized interest in NRC
19 oversight enforcement policies and safe nuclear energy
20 are academic interests, general interests. They are
21 not sufficiently concrete and particularized to confer
22 standing.

23 And if any person with a general public
24 interest in NRC oversight could intervene in any
25 enforcement action, the NRC standing requirements

1 would serve no function. And these proceedings would
2 be limitless.

3 Furthermore, the petitioners assert their
4 financial and resource interest, that they have
5 invested funds and research in following these issues
6 in the NRC over the past several years as well as the
7 funds they spent in 2003 following this matter. These
8 moreover do not amount to standing in this, a
9 sufficient interest to confer standing in this,
10 proceeding because those funds were voluntarily spent.
11 And they were not required by the order. Therefore,
12 they cannot be traced back to the order and fall
13 outside the scope of this proceeding.

14 And, moreover, the Union of Concerned
15 Scientists seeks generally to challenge the NRC's
16 broad enforcement policy. And the Commission issued
17 in 2004 in the Alaska Department of Transportation
18 case a statement that an adjudicatory process is not
19 an appropriate forum for petitioners to second-guess
20 enforcement decisions. In other words, adjudicatory
21 hearings such as this are not the appropriate forum to
22 consider NRC enforcement policy.

23 Therefore, the interest that the Union of
24 Concerned Scientists asserts in NRC enforcement
25 consistency falls outside the scope of this

1 proceeding.

2 And, finally, the Union of Concerned
3 Scientists has not asserted any injury, in fact, that
4 they can trace directly to this order. The order
5 imposes no requirements, no obligations on the Union
6 of Concerned Scientists. And they have not
7 established how the five-year ban prohibiting Mr.
8 Siemaszko from employment and NRC-licensed activities
9 would have any direct impact on their organizational
10 interests whatsoever.

11 Therefore, Union of Concerned Scientists
12 has not established standing to participate in this
13 proceeding.

14 CHIEF JUDGE McDADE: Okay. Thank you.

15 What is Mr. Siemaszko's position?

16 MS. GARDE: Well, Your Honor, I think that
17 they have established in the context of the contention
18 issue admissible contention and that Mr. Lochbaum has
19 made clear already today that their position is there
20 is no support; that is, the staff position is not
21 supported by the evidence in the context of sustaining
22 the enforcement action. Mr. Lochbaum is not a lawyer,
23 but in the context of his discussion, I think he
24 clearly has articulated that point.

25 The issue of standing, I really think,

1 frankly, to be fair to Mr. Lochbaum, UCS and the Ohio
2 Citizens group should be left for the supplementation
3 of a brief because it's my understanding that Mr.
4 Lochbaum speaks on behalf of this Ohio Citizens group,
5 that the Ohio Citizens group has numerous members that
6 are in the Ohio area, in and around the plant, and
7 that the injury, in fact, argument can be sustained by
8 its members, even if UCS' interest in nuclear power
9 safe operation, consistent with regulation would be
10 considered outside of the NRC's present posture on the
11 legitimacy of standing.

12 Let me make one additional point. And
13 that is that the case being cited by the staff on the
14 position, the recent case of the Department of
15 Transportation in public safety, was actually my case.
16 That case is on appeal presently in the Ninth Circuit
17 Court of Appeals because I would, frankly, think that
18 the staff and the Commission in that context went too
19 far in its standing argument. I'll be glad to share
20 that information with Mr. Lochbaum.

21 And I would just simply ask that on this
22 technical legal argument that you give Mr. Lochbaum
23 the opportunity to supplement this oral discussion
24 with his brief next week.

25 CHIEF JUDGE McDADE: What is the status of

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1 that in the Ninth Circuit? Have briefs been filed?
2 Has oral argument been scheduled?

3 MS. GARDE: Briefs have not been filed,
4 Your Honor. I don't expect them to be due until
5 September.

6 CHIEF JUDGE McDADE: Okay. Mr. Lochbaum,
7 anything further?

8 MS. GARDE: And it is that exact -- the
9 standing issue that is being contested by my client in
10 that case.

11 CHIEF JUDGE McDADE: Okay. Mr. Lochbaum,
12 anything further?

13 MR. LOCHBAUM: This is Dave Lochbaum. I
14 would echo the remarks of Mr. Siemaszko's counsel in
15 that our intent is to provide an additional brief by
16 next Thursday that would better address the standing
17 issue. We had intended to get affidavits from members
18 of both Ohio Citizen Action and the Union of Concerned
19 Scientists who live near the Davis-Besse reactor in
20 Ohio and live near some of the other reactors in the
21 United States to supplement or better address our
22 standing question.

23 I would also like to address one of the
24 points made by the NRC staff counsel that really
25 explains better than I could why UCS needs to be a

1 party to this proceeding.

2 The NRC staff counsel made several
3 comments about the NRC enforcement policy, which we
4 have had opportunities to comment on in the past when
5 the NRC put that policy out for public comment.

6 The problem is, just as with a law that is
7 put on the books, if the law is sound in its structure
8 but unsound in its application; for example, if a law
9 is okay in its structure but only green people are
10 ever arrested for violating that, even though
11 everybody does, or only women are arrested or there is
12 clearly a bias in how that law or regulation is
13 enforced, then the only time to really address that is
14 during the enforcement proceedings from that law.

15 We can comment until the cows come home on
16 the efficacy of the enforcement policy, but it's the
17 implementation that is flawed in this case. And this
18 proceeding is the best avenue for addressing and
19 correcting those errors.

20 CHIEF JUDGE McDADE: But doesn't Mr.
21 Siemaszko have both the interest and the ability to do
22 that in this proceeding? In other words, he has the
23 injury, in fact, as a result of this. Doesn't it
24 presume that he is the appropriate person to champion
25 his cause?

1 MR. LOCHBAUM: This is Dave Lochbaum. He
2 is, and he is doing that. His role or his goal, I
3 assume, is to avoid an unfair sanction. Our goal goes
4 a little bit beyond that. It is to flag an unfair
5 sanction and flag it in such a way that it gets, the
6 process gets, fixed so that the next unfair sanction
7 doesn't occur.

8 Mr. Siemaszko's primary interest is to
9 correct the wrong that the NRC staff did to him. Ours
10 is a little bit broader than that. We want to fix
11 that harm, but we also want to ensure that the NRC
12 stops inflicting harm on others down the road.

13 CHIEF JUDGE McDADE: Okay. Thank you.

14 I'd like to move on to the next issue.

15 MS. DUFFY: Excuse me.

16 CHIEF JUDGE McDADE: All right.

17 MS. DUFFY: This is Melissa Duffy for the
18 NRC staff. We would like to make one request. If Mr.
19 Lochbaum introduces new information in his reply that
20 he submits next week, we request the opportunity to
21 reply to that.

22 CHIEF JUDGE McDADE: I think that would be
23 appropriate, yes.

24 MS. DUFFY: Thank you.

25 CHIEF JUDGE McDADE: And also what I would

1 suggest maybe -- actually, Judge Hawkens and I are
2 going to be on travel next Friday. So instead of
3 doing it by Thursday, if you could file these briefs
4 by close of business, close of business being 5:00
5 o'clock Eastern time, next Friday?

6 MR. LOCHBAUM: This is Dave Lochbaum.
7 That would be fine. I would appreciate the extra day,
8 but I would do it Thursday as well.

9 CHIEF JUDGE McDADE: Well, there is no
10 necessity for you doing it on Thursday since two of
11 the three of us aren't going to be here to read it
12 anyway and Judge Lam is a very quick reader.

13 JUDGE HAWKENS: Ms. Duffy, this is Judge
14 Hawkens. In your submission next week, can you please
15 include any case law where an organization or a person
16 has sought to intervene in an enforcement action and
17 where that has, in fact, been granted?

18 If you're unable to find any of those, can
19 you address whether in your judgment any circumstances
20 would confer standing on an intervenor who sought to
21 impose an enforcement action?

22 MS. DUFFY: Yes, we'll do that.

23 JUDGE HAWKENS: Thank you.

24 CHIEF JUDGE McDADE: Okay. What I would
25 like to do is move on to the other issues. Mr.

1 Lochbaum, you are perfectly welcome to continue to
2 listen in on the call if you wish or you can sign off.
3 It's your option.

4 MR. LOCHBAUM: This is Dave Lochbaum.
5 With everybody's indulgence, I will sign off now.

6 CHIEF JUDGE McDADE: Okay. Thank you,
7 sir.

8 MR. LOCHBAUM: Thank you. Bye.

9 CHIEF JUDGE McDADE: The next option that
10 I wanted to discuss is, has there been discussion
11 among the parties as to whether this will proceed
12 under subpart G, subpart L, or subpart N?

13 MS. GARDE: There's been no discussion
14 among the parties, Your Honor. Mr. Siemaszko believes
15 that subpart G is appropriate in this formal
16 proceeding. I don't know what the staff's position
17 is. I'm sorry.

18 CHIEF JUDGE McDADE: This is Lawrence
19 McDade again. It almost doesn't matter because
20 subpart G is the default subpart. And unless
21 everybody agreed on a different subpart, it's going to
22 be under G. So if Mr. Siemaszko wants to proceed
23 under subpart G, then we proceed under subpart G,
24 regardless of what the staff's position is.

25 The reason I wanted to discuss that first

1 is because the other matter that I wanted to discuss
2 and get input from both of you on is the petition to
3 stay these proceedings.

4 Now, one of the issues in the petition to
5 stay the proceedings is discovery and whether or not
6 going forward with discovery is appropriate. And the
7 argument is that we are supposed to apply a balancing
8 test.

9 And given that the nature of discovery is
10 very different under subpart G, subpart L, or subpart
11 N, I wanted to have an idea of which subpart we were
12 proceeding under, which discovery regime we would be
13 proceeding under before we got into a discussion of
14 the stay.

15 So with that as preface, perhaps too long,
16 you're saying Mr. Siemaszko wishes to proceed under
17 subpart G. Is that correct?

18 MS. GARDE: That's correct, Your Honor.

19 CHIEF JUDGE McDADE: Okay. From the
20 staff's standpoint, do you see any other option? That
21 means we're proceeding under subpart G.

22 MS. BROCK: This is Sara Brock on behalf
23 of the staff. We agree. That would put us under G.

24 CHIEF JUDGE McDADE: Okay. Now, with
25 regard to the question on the stay -- and let me ask

1 some specific questions of the NRC staff on the issue
2 of a stay. And let me pose a hypothetical for you.

3 In your papers, you indicate that Mr.
4 Siemaszko has suffered and will suffer no harm as the
5 result of the stay. Assume for the sake of argument
6 -- and this is not a decision. This is just a
7 question that we have. If we viewed this as that he
8 has, in fact, suffered harm, that effectively what
9 happened here is de facto you have a preliminary
10 injunction against his participation in the nuclear
11 industry, that that preliminary injunction if we
12 granted the stay would continue until the end of these
13 proceedings, which could be three months, six months,
14 three years. And if, for example, it were three
15 years, effectively he would have an eight-year
16 suspension, as opposed to a five-year suspension, that
17 he is de facto unemployable in the industry under the
18 current state of affairs, and that, therefore, he has
19 an interest in moving forward and resolving this as
20 quickly as possible.

21 Is that analogy ill-taken? And if so,
22 why?

23 MS. BROCK: This is Sara Brock on behalf
24 of the staff. If I understand your question
25 correctly, assuming for the sake of argument that he

1 does have an injury, we would still maintain that the
2 stay should be granted.

3 There are several NRC cases where stays
4 have been granted due to the pendency of a criminal
5 investigation when the orders has been immediately
6 effective. In those cases, there is no question that
7 there has, in fact, been a defamation and harm to the
8 other party. And the public interest has still come
9 down. And the weight has been on behalf of allowing
10 the criminal investigation to continue without
11 interference.

12 I'm not sure if I am answering your
13 question.

14 CHIEF JUDGE McDADE: No. You are
15 answering the question. It is actually sort of, you
16 know, a number of layers in the question, at least in
17 my own mind. We need to do a balancing test. And,
18 therefore, we need to know what is on each side of the
19 balance in order to do that.

20 There are literally scores and scores of
21 Court of Appeals cases upholding grants of stays in
22 civil and administrative proceedings, whether it be in
23 the IRS context, the SEC context, or other regulatory
24 actions. In most of those, though, no sanction has
25 been taken against the individual. As a result, no

1 immediately effective sanction has been taken against
2 the individual.

3 Ultimately they may have to pay money for
4 a securities violation or a tax violation. And the
5 civil proceeding or administrative proceeding is
6 stayed.

7 I'm just trying to figure out. In your
8 papers, you seem to indicate that it is the staff's
9 position that he has not suffered any harm. As I look
10 at it, I have a question as to whether or not as a
11 result of the current order, de facto he has been put
12 out of the nuclear industry as we sit here and he will
13 be out of the nuclear industry until this matter is
14 resolved. And, therefore, if we grant the stay, we
15 are making what the staff considered, what the agency
16 considered to be a five-year suspension, perhaps a
17 five and a half-year or six-year or seven-year
18 suspension.

19 I'm just asking you to comment on that,
20 whether or not you disagree with that thinking and if
21 so, why.

22 MS. BROCK: Your Honor, respectfully, the
23 staff -- this is Sara Brock again -- does disagree
24 with that thinking. At this point since we have not
25 made the order immediately effective, Mr. Siemaszko

1 has not suffered any legally cognizable harm. He may
2 have suffered harm in the eyes of the public, but
3 nothing about his legal status has changed as a result
4 of this order.

5 He was not employed in the nuclear
6 industry prior to us issuing the order. And he is not
7 employed in the nuclear industry today. Whether or
8 not he might be employable in the future is something
9 that the staff can't speculate on. Obviously he would
10 not be employed if you upheld our order.

11 I think the weight of the case law,
12 especially if you go to Paul v. Davis, which is a
13 Supreme Court case we cited in our reply briefs,
14 stated that Mr. Siemaszko's reputation is not a
15 legally cognizable due process harm.

16 CHIEF JUDGE McDADE: What I'm not getting
17 at is a damage to his reputation generally. What I'm
18 asking is de facto isn't he unable to seek or get
19 employment in the nuclear industry with this
20 proceeding hanging over his head. I mean, de facto
21 would anybody hire him in the nuclear industry until
22 this is resolved?

23 MS. BROCK: Well, Your Honor, I think
24 that's somewhat a matter of speculation. Since he
25 wasn't employed before and he had already been quite

1 publicly identified by himself and by his counsel with
2 the events at Davis-Besse, I'm not sure that any lack
3 of employment can directly be tied to the NRC order.

4 JUDGE LAM: Now, Ms. Brock, this is Judge
5 Lam. Are you also saying in theory Mr. Siemaszko
6 could be employed today in the nuclear industry until
7 the order becomes effective?

8 MS. BROCK: Yes.

9 JUDGE LAM: I see.

10 CHIEF JUDGE McDADE: Let me ask, in the
11 event we were to grant a stay in this particular case,
12 the NRC determined that an appropriate sanction would
13 be a five-year suspension, would it be the position of
14 the NRC that any period of time during which a stay
15 was pending should be deducted from that so that the
16 suspension would be only five years?

17 MS. BROCK: No, Your Honor. Since the
18 order isn't yet effective, we have no way of enforcing
19 it. We actually wouldn't know if he was currently
20 employed. Our only basis for saying that he is not
21 currently employed in the industry was that was the
22 representation of his counsel when she requested a
23 hearing on the matter. But we wouldn't deduct it
24 because we have no way of knowing if he is currently
25 employed.

1 CHIEF JUDGE McDADE: Well, one of the
2 aspects of the order -- let me ask. Under the order,
3 if he became employed in the nuclear industry, he
4 would have to report that to you, would he not? Is
5 that part of it effective right now?

6 MS. BROCK: No, Your Honor, I don't
7 believe so since he would have to report it -- I will
8 turn to the order to ensure that I am accurately
9 reporting what it says.

10 MS. GARDE: Your Honor, this is Billie
11 Garde. I could read you that paragraph. I have it in
12 front of me.

13 CHIEF JUDGE McDADE: Good. Thank you.

14 MS. GARDE: It's paragraph 2 on page 9 of
15 the order, and it says, "If Mr. Siemaszko is currently
16 involved with another licensee in NRC license
17 activities, he must immediately cease those
18 activities, and inform the NRC of the name, address,
19 and telephone number of the employer, and provide a
20 copy of this order to the employer."

21 MS. BROCK: Your Honor, the position of
22 the staff would be that would be cone the order
23 becomes effective.

24 CHIEF JUDGE McDADE: That was my question,
25 whether or not as we sit here today until the order

1 becomes effective, he had that obligation to report to
2 the NRC. And it's the NRC's position that he does
3 not.

4 MS. BROCK: I'd like just a moment to
5 check with our technical staff on that question if you
6 don't mind.

7 CHIEF JUDGE McDADE: Please.

8 MS. GARDE: While she's consulting, again,
9 this is Ms. Garde. I would like to also add to this
10 part of the discussion that, in fact, I was contacted
11 directly by the NRC staff, I want to say about six
12 weeks, maybe two months ago, and asked if Mr.
13 Siemaszko was working in the industry and if he was
14 offered a job, I was to advise OI staff.

15 So I feel like I already am under an
16 obligation to advise them of that and have answered
17 that question, although obviously not in the form of
18 an order.

19 JUDGE HAWKENS: Ms. Garde, this is Judge
20 Hawken. Has your client made any efforts to get
21 reemployed in the nuclear industry?

22 MS. GARDE: Absolutely, Your Honor. Mr.
23 Siemaszko has made attempts to get jobs within every
24 aspect of the industry for which he is technically
25 qualified. Because he has a pending Department of

1 Labor case, he has kept very good records on
2 mitigation of damages.

3 And his attempts over the last several
4 years to even get a call-back -- he actually had some
5 call-back on the basis of blind technical skills. And
6 then as soon as they found out his name, he wasn't
7 ever called back to work.

8 JUDGE HAWKENS: Where is he working now?

9 MS. GARDE: He is working in Louisiana,
10 Your Honor. I'd rather not disclose the identity of
11 his employer, but it is not in the nuclear industry.
12 I will, of course, if you tell me, but I would ask for
13 protection so that he can't be bothered at work.

14 JUDGE HAWKENS: That's fine. Thank you.

15 MS. BROCK: Your Honor, it's the position
16 of the NRC staff that the order does not impose any
17 requirements until it is effective. And in response
18 to the comments of Ms. Garde about his Department of
19 Labor case and how he has kept good records over the
20 last several years in his efforts to keep employment,
21 in our mind that proves that this order has not
22 affected his employment opportunities at all, that he
23 has not been affected by this order. He was affected
24 previously by causes not related to the NRC staff
25 order.

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1 CHIEF JUDGE McDADE: Okay. Which actually
2 washes both ways because one of the things that you
3 all have suggested is that you need the order to keep
4 him out of the industry. And, yet, at the same time,
5 you are saying that he is out of the industry,
6 irregardless of the order.

7 MS. BROCK: Well, Your Honor, we can't not
8 issue an order that we think is necessary for public
9 health and safety assuming that no one will employment
10 an individual we believe poses a threat to public
11 health and safety, even though we may not think that
12 it's likely that he would be employed.

13 CHIEF JUDGE McDADE: Let me ask, sort of
14 moving on, does the staff view a distinction between
15 the time that there is an ongoing criminal
16 investigation and the time that a decision is made
17 either that an indictment should or should not be
18 handed up with a calculus change at that point.

19 MS. BROCK: Do you mean about whether or
20 not he was indicted, whether or not we would still
21 need the stay?

22 CHIEF JUDGE McDADE: Yes. Clearly if he
23 were advised that he is no longer and the NRC staff
24 was advised that he is no longer the subject of target
25 of an ongoing investigation, there would be no further

1 need for a stay. And there would be an obligation on
2 the part of the NRC staff to notify us of that so that
3 we would be able to proceed, even if a stay had been
4 granted. And I'm sure if Mr. Siemaszko was notified
5 that he was not a target or a subject, that he would
6 notify us.

7 But my question is, if the alternative
8 occurred, a criminal investigation is over, an
9 indictment is returned, at that point, the nature of
10 the charges against him would be well-known and
11 public. Would there be any reason in the staff's view
12 for a continuation of a stay at that point?

13 MS. BROCK: I just wanted to talk to two
14 things that you said. To your question if he was
15 indicted, would there still be a need for a stay, the
16 staff would need to consult with the Department of
17 Justice at that point and see the exact nature of the
18 indictment and if there was anything that we could
19 move forward with at that time.

20 At this point without knowing what the
21 indictment was, I'm not sure if we would or not.
22 However, even if he was indicted and that went to
23 trial criminally, some of the same discovery concerns
24 would apply. My understanding from the Department of
25 Justice is that statements of other witnesses are not

1 available in criminal proceedings.

2 In terms of if he was informed, I'll
3 answer your question in two ways. If the staff is
4 informed by the Department of Justice that we can move
5 forward with this proceeding, even if a stay isn't
6 granted, of course, we will immediately inform the
7 Board and all the parties that a stay is no longer
8 necessary.

9 However, it's possible that Mr. Siemaszko
10 could no longer be under a criminal investigation.
11 However, the Department of Justice would still request
12 a stay if they were still pursuing other individuals
13 due to the intertwining nature of so much of the
14 discovery material.

15 CHIEF JUDGE McDADE: But our calculus or
16 our balancing test might be significantly different
17 under a different set of facts.

18 MS. BROCK: That's true.

19 CHIEF JUDGE McDADE: Since the original
20 petition for stay was filed, have you heard anything
21 further from the Department of Justice with regard to
22 their time frame?

23 MS. BROCK: Your Honor, before I address
24 the question, I'd like to ask you a question. You had
25 requested that we stop disseminating the affidavits

1 until this call.

2 I think I heard someone else enter the
3 line, but I don't know if you wanted to discuss first
4 the issue of whether or not the affidavit should be
5 under seal or whether the conversation about it should
6 be prior to discussing what we may know about the --

7 CHIEF JUDGE McDADE: Well, first of all,
8 so far we haven't discussed anything about the
9 substance of the affidavit or anything that Mr.
10 Ballantine has said.

11 Secondly, at this point in time, I have
12 not heard either from the staff or from Mr. Siemaszko
13 that they would want to have that released or taken
14 out from under seal.

15 Am I incorrect on that? Does the staff
16 want it taken out and made public?

17 MS. BROCK: We filed it with the intention
18 of it being public. And the Department of Justice was
19 expecting it to be public. If you were to still place
20 it under seal, that's fine. Obviously that's your
21 prerogative.

22 I just thought I heard somebody else come
23 on the line. I wasn't sure if that was the reporter.

24 CHIEF JUDGE McDADE: Did somebody else
25 come on the line? Is there anyone on the line other

1 than --

2 MR. MANGLESON: Yes, Your Honor. It's
3 John Mangleson, the Plain Dealer in Cleveland.

4 CHIEF JUDGE McDADE: Okay. Good
5 afternoon, sir.

6 MR. MANGLESON: Good afternoon.

7 CHIEF JUDGE McDADE: So that answers the
8 question, but that doesn't answer the question about
9 what to do with that affidavit, which is now under
10 seal as a result of our order. It is your position
11 that the staff would like the seal lifted?

12 And you're saying it's the Department of
13 Justice's position that they believe it should be
14 lifted?

15 MS. GARDE: Your Honor, I don't know that
16 this is under seal. I think that it was not
17 electronically distributed, but I think it is hard
18 copy available to the world already.

19 CHIEF JUDGE McDADE: Well, we specifically
20 directed in our previous order that it not be
21 disseminated pending further order from this Board.

22 MS. GARDE: The government e-mailed it,
23 Your Honor. So I think when you said "not further
24 disseminated," the toothpaste is already out of the
25 tube.

1 CHIEF JUDGE McDADE: Okay. Is that
2 correct? Has it already been disseminated? And if
3 so, to whom?

4 MS. BROCK: Your Honor, this is Sara Brock
5 for the staff.

6 Once we received your order saying that we
7 should not further disseminate it, I immediately
8 contacted anyone in the agency who might have copies
9 of it and told them that they could not distribute it
10 any further and that staff has not disseminated it any
11 further.

12 However, I know that there has been an
13 article about it in at least one newspaper. And I
14 believe that Ohio Citizens has it posted on their Web
15 site.

16 CHIEF JUDGE McDADE: In the order that we
17 issued a few weeks ago, one of the things that I
18 believe that I asked is for you to consult with Mr.
19 Ballantine about the affidavit.

20 Did you have an opportunity to consult
21 with him? And did he articulate the position of the
22 Department of Justice?

23 MS. BROCK: Yes. I discussed your
24 specific question about rule 6(e)(2) and (3) with Mr.
25 Ballantine. He did not believe that the rule is

1 applicable to the affidavit. He stated that
2 everything in the affidavit was based on material
3 gathered prior to the convening of the grand jury.
4 And his expectation was that it would be a public
5 document.

6 However, that being said, the staff
7 doesn't have any independent interest in it being
8 public. So to the extent that the Board wishes it not
9 to be, we have no objection to that. We just have no
10 basis. In general, all of our filings are public.
11 And we have no basis for withholding that one.

12 CHIEF JUDGE McDADE: Okay. What is the
13 position of Mr. Siemaszko on this?

14 MS. GARDE: Your Honor, I think, as I
15 said, the toothpaste is already out of the tube. The
16 affidavit already received wide distribution. And I
17 think the sense is that Mr. Ballantine's affidavit
18 upon which they're all relying upon is it not being
19 problematic is that it was all based on information
20 gathered in an OI report before the grand jury
21 proceeding even convened. So he is not disclosing
22 anything that is grand jury-related because he is only
23 relying upon OI stuff that was gathered before the --

24 CHIEF JUDGE McDADE: Hello?

25 MS. GARDE: Yes. I'm here.

1 CHIEF JUDGE McDADE: Okay. So cutting to
2 the chase on this, what is your position? Should it
3 be under seal or should it not be under seal?

4 MS. GARDE: Not be under seal.

5 CHIEF JUDGE McDADE: And that's the
6 staff's position as well?

7 MS. BROCK: Yes.

8 CHIEF JUDGE McDADE: Well, we will make a
9 decision on that and then the next order that we issue
10 address it. Having spent more than 25 years as a
11 prosecutor for the Department of Justice, I was
12 extremely surprised to see an affidavit such as the
13 one submitted by Mr. Ballantine, to put it mildly.
14 But, in any event, we will make a decision on that.

15 Specifically with regard to a motion for
16 a stay, does the NRC have anything further to say with
17 regard to that to supplement the papers that have been
18 submitted?

19 MS. BROCK: Beyond what we have already
20 said, no, Your Honor. We would completely emphasize
21 we think the weight of the case law in the public
22 interest is in allowing the criminal prosecution to go
23 forward uninhibited. And since these are routinely
24 granted when orders are immediately and this order was
25 not immediately effective, it's a clear overriding

1 public interest in protecting that criminal
2 investigation and staying the civil proceedings.

3 CHIEF JUDGE McDADE: And without getting
4 into the substance of it and speaking in only general
5 terms, what do you think that would be discoverable on
6 the part of Mr. Siemaszko in these proceedings could
7 in any way interfere with Mr. Ballantine's
8 investigation?

9 MS. BROCK: Well, Your Honor, the OI
10 report -- I'm sorry. I'm trying to answer that
11 question without getting into the substance. There
12 are numerous witness interviews and statements that if
13 disclosed would interfere with the criminal
14 investigation as well as thousands of pages of
15 records.

16 CHIEF JUDGE McDADE: These are interviews
17 of witnesses who are not government employees? These
18 are interviews of witnesses who were employees of
19 Davis-Besse?

20 MS. BROCK: Your Honor, that would be
21 true. There may also be some interviews of government
22 employees.

23 CHIEF JUDGE McDADE: Okay. Would there be
24 any interest in our doing this balancing test of
25 preventing discovery of the statements of government

1 employees?

2 I mean, they're not likely to change their
3 story. They're not going to lose their jobs. They're
4 not going to be subject to intimidation under any
5 circumstances based on what statements they have made.

6 What is the staff's position? Would there
7 be any benefit to the government by withholding those
8 statements from Mr. Siemaszko, statements of
9 government employees, government inspectors,
10 government agents?

11 MS. BROCK: Yes, Your Honor, because
12 according to the criminal rules -- I must admit I'm
13 not familiar with that. I'm going to return to the
14 affidavit for that.

15 CHIEF JUDGE McDADE: But it's rule 15 of
16 the Federal Rules of Criminal Procedure is the
17 principal guidance.

18 MS. BROCK: Well, witness statements are
19 not available to potential target. And the benefit to
20 the government is that in the event of an indictment,
21 Mr. Siemaszko would not be entitled to see those
22 witness statements prior to the indictment into the
23 trial, which would apply both to any government
24 employees who were interviewed and federal
25 investigators and also to nongovernmental employees.

1 CHIEF JUDGE McDADE: Okay. Under certain
2 circumstances under 18 USC section 3500, witness
3 statements are not available. The general background
4 or basis for that is to prevent witness intimidation.

5 At the same period of time, if the witness
6 is a technical witness, an expert witness, that is
7 inapplicable in the specific requirement in rule 16.
8 I believe it's 16(a)(1)(f) and (g) that make those
9 discoverable in any event.

10 In practice, although the statement, 18
11 USC 3500, prevents mandatory disclosure of witness
12 statements, unless it is a situation, a case involving
13 the potential for violence, potential for witness
14 intimidation, every district court in the country
15 makes those available prior to trial simply to make
16 the trial go quicker so that people don't have to stop
17 and wait and read the statements and then ask for a
18 continuance, that it's the rare circumstance where
19 there's a potential for witness intimidation that
20 those are withheld in practice.

21 But, again, at this point, my question
22 just simply involves government witnesses. Would
23 there be any reason -- and what is the staff's
24 position as to why those should be withheld? And
25 should they be withheld even after an indictment is

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1 returned and the issues are joined?

2 MS. BROCK: Your Honor, the staff would
3 like to consult with Department of Justice prior to
4 answering that question if possible. We could file
5 something on it, but at this point all I can go on is
6 their statement in the affidavit stating that they
7 have not made any witness statements available and
8 that they don't need to release prior witness
9 statements and that it would harm the criminal
10 proceedings if this administrative hearing continued.

11 CHIEF JUDGE McDADE: Judge Lam has a
12 question.

13 JUDGE LAM: Ms. Brock, you earlier
14 indicated that you may come back at the end of this
15 day to request additional delay. At this point in
16 time do you know what is the likelihood of that
17 additional request?

18 MS. BROCK: Your Honor, the 120 days was
19 the amount of time estimated by the Department of
20 Justice that they would need. They have not changed
21 that estimate.

22 JUDGE LAM: But my question was earlier
23 you said that depending on what the status of the
24 grand jury investigation will be at the end of 120
25 days, you may consider asking for another delay. Did

1 I understand you correctly?

2 MS. BROCK: Yes, you understand this
3 correctly. And at this point, we have no further
4 knowledge on whether or not we would need an
5 additional delay than we did when we filed the
6 original motion and affidavit.

7 JUDGE LAM: So you have no estimate as to
8 how likely would that additional request would be?

9 MS. BROCK: No. I'm sorry, Your Honor.
10 It partially depends on what happens with the criminal
11 investigation.

12 JUDGE LAM: Okay. Thank you.

13 CHIEF JUDGE McDADE: Anything further from
14 the NRC staff on this issue?

15 MS. BROCK: No.

16 CHIEF JUDGE McDADE: For Mr. Siemaszko?

17 MS. GARDE: Yes, Your Honor. I have a
18 couple of things I would like to address. I obviously
19 don't know anything further in terms of additional
20 delay, but as to the questions that you had regarding
21 the materials, I think there is a significant issue
22 here to discuss regarding the availability of even the
23 OI report. As the affidavit itself says and as I
24 referenced earlier, the grand jury proceeding started
25 after the OI report was apparently concluded.

1 So it isn't going to impact per se that
2 the material -- they're not speaking grand jury
3 materials. We are talking about witness statements as
4 the only thing that he may not be able to get under
5 the criminal rules, but even under those
6 circumstances, the disclosure of at least a privilege
7 log or a list, so to speak, of the things that aren't
8 being turned over or are being withheld pending a
9 final grand jury action would enable us to proceed.

10 You know, the purpose of a grand jury in
11 theory is to protect the innocent. And that has long
12 since passed in this case. Mr. Siemaszko's publicly
13 been tarred and feathered here, if not completely
14 destroyed in the context of his professional
15 reputation.

16 He seeks this hearing to undo the
17 accusations against him and hopefully be able to right
18 his career path. And there is plenty of information
19 available in numerous venues that we could get started
20 on. And I think the pendency of the grand jury
21 proceeding wouldn't impact that.

22 I made reference to that in my pleadings
23 to the extensive root cause investigations conducted
24 by the company, the extensive augmented inspection
25 team work done by the staff.

1 I can't imagine that the thousands of
2 pages of documents that she refers to that are being
3 presented to a grand jury in theory are not already
4 contained within the materials that are publicly
5 available and have served as the foundation of all of
6 the root cause work that has been done in this case
7 already.

8 I want to ask my partner to speak to this
9 as well because he has looked into this issue for us.

10 CHIEF JUDGE McDADE: Before you do, let me
11 just ask one quick question here. You know, with
12 regard to grand jury secrecy, the rules are directed
13 to government attorneys, government agents, and to
14 grand jurors. You all have no obligation whatsoever
15 of grand jury secrecy.

16 I'm going to ask a question, but preface
17 it with no inference will be taken if you choose not
18 to answer the question. And remember that there is a
19 newspaper reporter on the line as well. And, again,
20 no inference one way or the other will be taken if you
21 choose not to answer the question.

22 Has your client been advised that he is
23 the subject or target of a grand jury investigation?

24 MS. GARDE: Sir, I will answer that
25 question. The answer to that question is yes, he did

1 receive communication from the -- and I disclose that,
2 Your Honor, not for the first time -- and I think the
3 newspaper reporter is aware of that -- but because in
4 the Department of Labor proceeding that was actively
5 ongoing in litigation is now on hold pending the
6 outcome of the criminal proceeding. And so we have
7 already disclosed that in another forum.

8 Now, that said, that was well over a year
9 ago. And there has been very little, if any, contact
10 between the Justice Department and Mr. Siemaszko's
11 criminal defense attorney in a very long time.

12 He has never testified. He hasn't been
13 subpoenaed to testify. There were letters and
14 correspondence going back and forth, but that was the
15 end of it. We haven't heard anything for a very long
16 time.

17 CHIEF JUDGE McDADE: Okay. I interrupted
18 you. You indicated that your partner --

19 MS. GARDE: I'm going to ask Mr. Clifford
20 to also address the issue of the grand jury.

21 MR. CLIFFORD: Yes. I was struck by the
22 paragraph in Mr. Ballantine's affidavit where he
23 emphasizes his affidavit was based on materials
24 gathered in the OI investigation and elsewhere prior
25 to the convening of the grand jury.

1 I read that to indicate that he could
2 freely discuss these materials and the information
3 because they were not subject to the grand jury
4 secrecy. And so the government has taken the
5 opportunity to share these and actually to e-mail Mr.
6 Ballantine's affidavit to the Ohio group and to the
7 Union of Concerned Scientists.

8 It seems to me that just as one cannot
9 attach attorney-client privilege to, oh, let's say, a
10 business record or a photograph by sending it to one's
11 counsel, that one cannot attach secrecy to an
12 otherwise public document by subsequently sending that
13 document or that report to the grand jury. I think
14 that is what Mr. Ballantine is implicitly
15 acknowledging in his own affidavit.

16 This looks to me like the government is
17 trying to describe information that is supposedly
18 before the grand jury and tell how incriminating to
19 Mr. Siemaszko it is and then at the same time to say
20 this can't be revealed because of grand jury secrecy
21 and because it wouldn't have the right to do this or
22 to get this information under the criminal rules of
23 discovery.

24 The government has chosen here to
25 institute a proceeding. They had a statute of

1 limitations type reason for doing it when they did.
2 And they released, selectively released, information
3 that is certainly not helpful to Mr. Siemaszko. And
4 now they want to see -- so you can't see the rest of
5 the information, what might be Brady material,
6 exculpatory material because we have this cloak of
7 secrecy that we're attaching to it.

8 I don't think they can subsequently cloak
9 secrecy around stuff that is otherwise public or
10 discoverable and would naturally be discoverable in
11 this proceeding.

12 You know, there comes a time when they
13 might have to choose between options. If, in fact,
14 Mr. Siemaszko were indicted, tried, and convicted,
15 let's face it. He's going to be affected. He's going
16 to be barred at that point from working in the
17 industry.

18 But they want to have two bites at the
19 apple. And they're trying to take the bites in the
20 opposite order from what would normally be done.

21 I guess the other thing I would simply add
22 is that the grand jury is a device coming from Magna
23 Carta and then trying in the Fifth Amendment to
24 protect the rights of individuals from unjust
25 prosecution.

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1 I think in this case the grand jury is
2 being misused, but to try and say that Mr. Siemaszko
3 shouldn't be able to enforce his civil rights in this
4 case because of the pendency of a grand jury
5 investigation seems to me to turn the Fifth Amendment
6 right, the grand jury, on its head.

7 They have released, selectively released,
8 information that supposedly they presented to the
9 grand jury. And he has been harmed by that release.
10 And certainly it has been made public. And now
11 they're saying, well, you can't go and get the rest of
12 it that may very well set you free. That's not right.

13 Thank you.

14 CHIEF JUDGE McDADE: Okay. Anything
15 further from Mr. Siemaszko?

16 MS. GARDE: Not at this time, Your Honor.

17 CHIEF JUDGE McDADE: What is Mr.
18 Siemaszko's position with regard to whether or not he
19 is suffering injury, in fact, now?

20 MS. GARDE: Yes, he is suffering injury,
21 in fact, now. He believes that from the time that he
22 was fired and first initially blamed for having some
23 role in this, which has now been expanded to the NRC's
24 accusations in this case, that he has become persona
25 non grata within the industry on selected facts, on

1 which he has not yet had an opportunity to clear his
2 name.

3 And we're seeking at the first available
4 opportunity to do that and I think in the context of
5 demonstrating that the staff cannot sustain or support
6 the case it has against him is a very important first
7 step.

8 CHIEF JUDGE McDADE: Would it be arguable,
9 though, that the injury that he is suffering right now
10 is because of the action that Davis-Besse, rather than
11 the action of the NRC?

12 The NRC did not require that he be
13 terminated from his employment. And it's the NRC
14 staff's position that as of now, they are not doing
15 anything that prevents his employment in the nuclear
16 industry, with Davis-Besse or anyone else.

17 MS. GARDE: I can certainly understand the
18 staff's argument. He was terminated. His termination
19 ultimately resulted in our attempt to resolve it,
20 which was unsuccessful, and then ultimately did result
21 in having to file a Department of Labor complaint,
22 which was public.

23 In the context of what is the cause of a
24 person or a company not hiring him, you could put a
25 point in time and say, "Well, up to this point in

1 time, it may be because of the publicity surrounding
2 the Department of Labor case. And after this point in
3 time, it may be by the NRC's enforcement action."

4 There's no question that he has been
5 scapegoated at the heart of this case. And he needs
6 to exonerate himself. I think the concept that he has
7 de facto or the concept advanced that, somehow or
8 another, he stands on equal footing with any other
9 nuclear engineer in the business and can get a job
10 kind of equal to anyone else because he hasn't yet
11 been either convicted or barred from the industry is
12 as a practical matter nonsense.

13 He is de facto banned until this thing is
14 resolved. Whether he ever can recover is speculative.

15 CHIEF JUDGE McDADE: What was the interval
16 of time between his termination and his receipt of
17 this enforcement sanction? And during that time, did
18 he make any effort to get reemployed in the nuclear
19 industry?

20 MS. GARDE: He did make attempts to get
21 reemployed in the nuclear industry. He was terminated
22 in September 2002. This action, as you know, was
23 initiated in April 2005. And there's a lot of
24 publicity connected with this action.

25 He has made attempts since being

1 terminated to find employment. So as a factual
2 matter, this has been an ongoing effort on his part,
3 which has been largely unsuccessful.

4 In the context of preparing for the
5 Department of Labor case, I have kept those records.

6 MR. CLIFFORD: If I can just chime in for
7 a second in terms of the injury? One of the fields I
8 practice in is torts and defamation. The law
9 recognizes injury from republication of defamatory
10 material.

11 In this instance, the agency chose to not
12 only issue its proposed order but to do so with as
13 much publicity as they could get. And it certainly
14 adds injury. It's also the government talks about
15 grand jury secrecy as if it's designed only to give
16 the government a fair chance to put together a case
17 and make a conviction.

18 The grand jury's secrecy also is designed
19 to protect the rights of the accused so that the
20 accused isn't going around having everyone talk about
21 the testimony that has been presented to a grand jury
22 before a grand jury returns a true bill.

23 In this case, they have chosen through the
24 affidavit of the U.S. Attorney to collectively
25 disclose the materials that allegedly are

1 incriminating Mr. Siemaszko and at the same time
2 withholding the rest of the record, which we believe
3 would exculpate him.

4 So we think that, of course, there was
5 initial severe injury from being fired in a very
6 disgraceful way, but it continues and is piled on.
7 And it's sort of a snowball effect to have the
8 government adding these charges and not give him a
9 chance to defend himself.

10 Thank you.

11 CHIEF JUDGE McDADE: Let me just say one
12 thing right now just to sort of at least focus it in
13 my mind. What we're looking at by harm is not harm in
14 a vacuum. We're looking at what harm happens to Mr.
15 Siemaszko by our granting a stay. And what we then
16 have to do is balance, you know, not the harm of
17 everything in the world but just what is the harm to
18 him from our granting a stay and then balancing that
19 against the harm to the government of our not granting
20 the stay. At least that is the way I see the issue
21 right now.

22 Counsel for Mr. Siemaszko, do you see the
23 issue as different than that for --

24 MS. GARDE: Your Honor, you're right. You
25 know, justice delayed is the primary issue here.

1 Since he is not currently working in the industry, he
2 hasn't had any luck funding work in the industry,
3 although he continues to attempt to do that, I think
4 the delay is one in which the sooner he gets this
5 behind him, the sooner he at least can say assuming we
6 would prevail, "Look, once the facts were ultimately
7 laid out, I was exonerated. Please take that into
8 consideration if I am otherwise the best qualified
9 candidate for this job."

10 CHIEF JUDGE McDADE: Let me ask another
11 question here without prefacing. I have no idea what,
12 if any, relevance this would ultimately have in our
13 decision, but let me ask the question. And, again,
14 you're free not to answer it if you think it is
15 inappropriate.

16 If someone were suspended from work in a
17 profession or industry in which they were earning
18 \$100,000 a year and because of that they went out and
19 found other employment in which they were earning
20 \$20,000 a year, a delay in resolving that would have
21 direct financial consequences.

22 On the other hand, if someone were
23 suspended from an industry or a profession where they
24 were earning \$100,000 a year, were able to go out and
25 seek and find employment in another industry or

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1 profession, also earning \$100,000 a year, the harm
2 might be less direct, less focused.

3 MS. GARDE: You're exactly right, Your
4 Honor.

5 CHIEF JUDGE McDADE: Do you wish to
6 discuss at all the difference in earning capacity of
7 Mr. Siemaszko if this order were resolved, as opposed
8 to what it is now?

9 MS. GARDE: Well, I appreciate the
10 question because, frankly, it is one of those things
11 that you would think is obvious, but Mr. Siemaszko's
12 earning power has gone down to virtually nothing.

13 I think he's making a little above minimum
14 wage, but when you think about the impact of this
15 event on him and remembering he is an engineer with
16 particular areas of expertise, he has to go back to
17 essentially industries in which a background, a
18 security background, in which you would have to
19 disclose all of this information on it, is not even
20 asked.

21 So think in the context of today's issue
22 of security of the level, the entry-level positions or
23 the type of positions that he could find where he did
24 not have to disclose this matter on any kind of
25 application form because every time he has, then it

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1 has not resulted in any employment.

2 I mean, he was employed previously in
3 shipyards, which now require homeland security
4 backgrounds and disclosure of all potential arrests or
5 any kind of action against you. And none of those
6 things have been able to pan out.

7 So he was unemployed completely for over
8 three years and is now only recently severely
9 underemployed. And, as I said, I hesitate to disclose
10 in the record where he works just to try to give him
11 some privacy in reestablishing his life, but his
12 salary level is minuscule compared to where he was
13 having come to this country from Poland, worked his
14 way up from the bottom in the industry to achieve the
15 position that he did get and then to have these things
16 happen to him.

17 So to the extent that I didn't articulate
18 that underemployment, I certainly hope that you would
19 consider it as a supplement to my answer. And thank
20 you for the question.

21 CHIEF JUDGE McDADE: Okay. Anything
22 further from Mr. Siemaszko?

23 MS. GARDE: Not on this point, Your Honor.

24 CHIEF JUDGE McDADE: From the staff?

25 MS. DUFFY: Your Honor, the staff would

1 just like to respond to a few things said by counsel
2 for Mr. Siemaszko. One, the statement that the staff
3 was doing all it could to publicize the order, the
4 staff would respectfully disagree.

5 We send out a glandered press release with
6 this enforcement action along with the proposed fine
7 to the licensee, as we do in every enforcement case,
8 but we didn't seek any further publicity on it.

9 And in terms of the harm that Ms. Garde
10 has identified that Mr. Siemaszko is suffering and
11 anything he might have to disclose on security-type
12 forms, I believe those would run to any such type of
13 criminal prosecution he is undergoing or potentially
14 his firing by FENOC, but none of those can be tied to
15 the order issued by the NRC staff.

16 And that order issued by the NRC staff is
17 the only thing that this proceeding can resolve. And
18 the only harm that should be considered is the harm
19 that he is suffering due to the order, which is not
20 yet effective, being on the table.

21 So it would really only be -- in your
22 balancing test of whether or not to delay, it's only
23 how he is harmed by the order that we issued in April,
24 not anything else that may have happened, certainly
25 not any publicity due to his own filing of a

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1 Department of Labor complaint or any actions on the
2 licensee or any actions by the Department of Justice.

3 CHIEF JUDGE McDADE: Okay. Thank you.

4 Judge Lam, do you have anything further?

5 JUDGE LAM: No, thank you.

6 CHIEF JUDGE McDADE: Judge Hawkens?

7 (No response.)

8 CHIEF JUDGE McDADE: I think that's all
9 that we need to cover today from the Board's
10 standpoint. We had talked about allowing additional
11 pleadings. In the first one, we had indicated that a
12 week from Friday might be appropriate, close of
13 business.

14 And I would ask, then, if it's agreeable
15 with my colleagues, if either Mr. Siemaszko or the
16 staff has anything further to add on this point, if
17 they could submit it in writing by 5:00 o'clock
18 Eastern time a week from Friday, again with the caveat
19 that if either, as opposed to raising new argument,
20 introduces any new facts into the mix, that the other
21 party would have until the following Friday close of
22 business, 5:00 o'clock, to respond to that, to address
23 any additional facts, again, not just argument, not
24 clarification of argument, but if there are new facts
25 thrown into the hopper, I think it only fair that the

1 other party have an opportunity to respond to them.
2 Is that agreeable to the staff?

3 MS. BROCK: That's fine, Your Honor. We'd
4 just like clarification. Are we speaking now on the
5 UCS position or are you requesting additional filings
6 on the motion to stay the proceeding?

7 CHIEF JUDGE McDADE: I'm not requesting
8 additional filings on the motion to stay the
9 proceedings. And my colleagues if they disagree can
10 chime in. We're not requesting additional pleadings.
11 We're offering the opportunity to both parties to
12 based on the discussion we have had here today
13 supplement if they wish.

14 It is not required. We are not demanding
15 it. What we are saying is if you think it would be
16 helpful, if you wish to clarify anything, or if there
17 are any facts that you thinks should be brought to our
18 attention based on the nature of our questioning or
19 based on the argument made by the opposing party, you
20 would be given the opportunity to do so; again, not
21 required but the opportunity.

22 If that pleading includes only argument,
23 discussion, then that should close the pleadings. On
24 the other hand, if either party introduces additional
25 facts, then the opposing party would have an

1 opportunity by the following Friday to respond to
2 those facts if they believe it appropriate.

3 Again, this isn't a mandatory pleading.
4 You don't have to submit anything if you don't want.
5 If you think it would be helpful that from your
6 standpoint, there's something that you would like to
7 emphasize, something that the opposing party raised
8 that you would like to contradict, something that I or
9 one of my colleagues on the Board has said that would
10 indicate to you that we are traveling intellectually
11 down the wrong path and you want to snatch us back to
12 reason before we go too far down that path, you have
13 the opportunity to do so.

14 Judge Hawkens, is that agreeable?

15 JUDGE HAWKENS: That's right.

16 CHIEF JUDGE McDADE: Judge Lam?

17 JUDGE LAM: That's right.

18 CHIEF JUDGE McDADE: Do either of you have
19 anything further to add before we sign off here?

20 MS. GARDE: This is counsel for Mr.
21 Siemaszko. The only thing I have a question about,
22 Judge, is one of the things on the schedule to be
23 discussed today was the scope of the proceeding and
24 whether, even if you granted a delay, there was
25 discovery that could proceed.

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1 I kind of addressed the discovery question
2 in a roundabout way in a previous discussion we had
3 already on today's call, but I don't know if you
4 wanted to skip that if you think we have covered that
5 in enough detail.

6 But I do want to make sure the record is
7 clear that we believe, even if you would agree to a
8 delay, that there is a substantial amount of discovery
9 that we believe could be undertaken in the pendency.
10 We don't want to delay. We are opposed to any delay.

11 But if you decide to grant a delay, that
12 we would like to utilize that time frame to proceed
13 with what we can do. And we think that the issues can
14 be pretty easily identified, but it probably will take
15 either another conference call or some additional work
16 to frame up the issues precisely.

17 CHIEF JUDGE McDADE: Okay. And just to
18 clarify in my own mind, I thought we had discussed
19 this, but it was my understanding that it is the
20 staff's position that if we were to grant a stay, that
21 step number one, the mandatory disclosures required
22 under subpart G are disclosures that they believe
23 would be harmful, potentially harmful, to the
24 government ongoing activities and that they would be
25 opposed to making those mandatory disclosures under

1 subpart G; that it's the position of Mr. Siemaszko
2 that the mandatory disclosures under subpart G would
3 not in any event hinder the other ongoing government
4 activities. Have I correctly understood the staff's
5 position?

6 MS. BROCK: Yes, Your Honor. And if I
7 could clarify something about the way our enforcement
8 process works that might be helpful? Our Office of
9 Investigations investigates issues of wrongdoing. And
10 so this order since it involves wrongdoing with space
11 largely on the OI report of investigations.

12 So that's what we viewed would be our
13 disclosure obligation and what the order is relying
14 on. And that is what we have been requested not to
15 disclose.

16 CHIEF JUDGE McDADE: Specifically, the
17 report that was prepared by the Office of
18 Investigation, which includes with it I assume sort of
19 the equivalent of FBI 305s; in other words, their
20 statements, memos of interview that they have had with
21 various individuals, both government individuals and
22 individuals from the private sector?

23 MS. BROCK: Yes. It's the report and the
24 accompanying exhibits, exhibiting material.

25 CHIEF JUDGE McDADE: Analysis of that,

1 correct?

2 MS. BROCK: Yes.

3 CHIEF JUDGE McDADE: Okay. And, just so
4 I'm clear of Mr. Siemaszko's position, do you believe
5 that all of that, even if we granted a stay, should be
6 discoverable at this point in time?

7 MS. GARDE: Well, no. I don't think you
8 completely understand my position. So let me go over
9 this again. I completely agree that without the full
10 disclosure of the OI report and the information
11 contained in the OI report that serves the foundation
12 of this enforcement action, we cannot proceed to
13 trial. I agree with that.

14 Now, that said, the issue of, if you will
15 forgive me, the comparison of what did Mr. Siemaszko
16 know and when did he know it and what did the rest of
17 the management staff know and when did they know it
18 with respect to these very same issues have been the
19 subject of substantial work by the staff and by FENOC
20 itself.

21 In fact, FENOC when they fired Mr.
22 Siemaszko reached a conclusion that he did not
23 intentionally do anything wrong. There is a specific
24 statement in his termination letter that says he did
25 not engage in "any deliberate misconduct."

1 The staff Inspector General report of
2 where the staff did not rely upon information that was
3 available to it goes to the heart of one of the points
4 being made by the staff; that is, that the NRC relied
5 upon the information that Mr. Siemaszko is being
6 accused of being inaccurate and incomplete.

7 So I have a broader concept of what is
8 relevant and discoverable than just the OI report.
9 And I think there is substantial work in that area
10 that can be done and that all of that information is
11 already publicly available.

12 I don't think the staff gets to just
13 identify this narrow little scope of information to
14 say this is it and not disclose the rest of the
15 information available to the staff outside the
16 enforcement context that this supports this
17 enforcement action.

18 CHIEF JUDGE McDADE: When you say it's
19 publicly available, what do you mean? And if it is
20 publicly available, don't you have it?

21 MS. GARDE: Well, I don't get under FOIA
22 a lot of information that the staff claims an
23 exemption for. Plus, under FOIA, they're going to
24 charge me huge amounts of money for stuff that I
25 believe I'm entitled to get under discovery in subpart

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1 G.

2 So I have collected and the staff has --
3 as you probably know but maybe don't, the staff
4 because -- Davis-Besse became such a notable event has
5 gone overboard in terms of making a lot of this
6 information available to the public. That said, the
7 underlying, for example, interview statements, you
8 know, inspectors' notes, documentation isn't in the
9 Public Documents Room. I'd have to get it under FOIA.

10 But it is organized. I think it's there.
11 I don't have that.

12 CHIEF JUDGE McDADE: So under FOIA, when
13 there is an ongoing investigation, the material would
14 be withheld anyway, wouldn't it?

15 MS. GARDE: Not inspections.
16 Investigations are going to withhold but not the
17 inspections.

18 JUDGE LAM: This is Judge Lam. Ms. Garde,
19 after listening to you, perhaps it would be a good
20 idea for you to meet with the staff and come up with
21 a mutually agreeable area of discovery assuming the
22 stay is granted that can be initiated at this point in
23 time because I hear earlier that you said you agree
24 with the staff that the OI report should not be
25 subject to discovery at this point in time if a stay

1 is granted. But there are other areas that you would
2 like information from. Do you think that would be a
3 good idea for you --

4 MS. GARDE: I think it's a great idea to
5 meet with the staff and discuss discovery, and I will
6 call Sara and see if we can get that meeting together.
7 But I do want to correct something that you just said.
8 And if I said that, I apologize and misspoke.

9 I do not believe that everything in the OI
10 report should be withheld under any circumstances. I
11 think even if you grant the stay, that there is
12 information underlying that OI report that should be
13 made available.

14 And that's why I suggested that the staff
15 do a log similar to a privilege log, in which they
16 identify the documents and withhold only the minimal
17 number of documents that they could, arguably, say
18 don't have to be disclosed.

19 I really, frankly, think that that would
20 be limited to a very small number of witness
21 statements, of other witness statements.

22 CHIEF JUDGE McDADE: Okay. One last
23 question. This is Lawrence McDade again. A quick
24 question. Under subpart G in discovery, there is a
25 presumptive schedule where there is mandatory

1 disclosure. Then you have to submit your specific
2 discovery, interrogatories, requests for admissions,
3 positions, close of discovery, motions for summary
4 disposition, filing of motions, et cetera.

5 If we were to grant a stay, aren't we just
6 sort of holding things in place? In other words, you
7 would get the discovery once the stay was lifted at
8 the same period of time that you would normally get it
9 before each one of these milestones. If you were to
10 get the discovery earlier than that, wouldn't it only
11 be for purposes of dealing with these other ongoing
12 proceedings but not our proceeding on the sanction?

13 MS. GARDE: Well, Your Honor, I think that
14 if you're going to grant he stay, that there is
15 nothing gained by following the dates to the minimal
16 letter.

17 I think that if you're going to grant the
18 stay, that you should expand the deadlines under
19 subpart G so that we have additional time. I need to
20 have at least that amount of time that's in subpart G
21 for the information that is withheld.

22 So I guess in my mind -- and I don't want
23 to be seen as supporting or acknowledging the stay is
24 appropriate. But if you were considering a stay and
25 were asking, "Okay. What can we do with a schedule

1 that makes the most sense and is the most efficient?"
2 I think because there is such a large body of material
3 that we could pretty efficiently utilize this time
4 frame.

5 The staff would make their initial
6 disclosures. I would expect those initial disclosures
7 to include the inspections and other staff-generated
8 or received information that was relevant to the issue
9 of the work order and why they say that had they had
10 that information, the staff would have acted on all
11 the issues set out in the enforcement order, that
12 discovery could proceed within the context of that
13 information, and then once the withheld information
14 was released, that we would kick in these dates. Then
15 the subpart G dates, the clock would start ticking.

16 But I guess I expect that if you issued a
17 stay, you would, as your order implies, expect us to
18 make efficient use of the time period between now and
19 when the stay expired to get a lot of this stuff
20 behind us.

21 CHIEF JUDGE McDADE: Okay. Thank you.

22 Anything further from the staff?

23 MS. BROCK: Well, Your Honor, I would just
24 state they sent that information that is publicly
25 available. Ms. Garde doesn't need the FOIA. It's

1 available on our ADAMS documents system. That's
2 certainly not something that we are attempting to --
3 we are not attempting to withhold from her information
4 that is publicly available, but she should be able to
5 get it under FOIA or under discovery procedures.

6 CHIEF JUDGE McDADE: Okay. Well, just to
7 summarize here where we are, with regard to the issue
8 on the stay, both of you have the option by close of
9 business next Friday, 5:00 o'clock Eastern time to
10 submit anything further in writing that you wish.

11 If any factual, new factual, information
12 is supplied in that, the opposing party would have
13 until the following Friday to respond to that in
14 writing.

15 If you would also, I would ask the staff
16 to put this burden on you. When Mr. Lochbaum was on,
17 we indicated to him that he would have the opportunity
18 to submit by close of business Friday. If you would
19 also make it clear to him that in the event any
20 additional facts on the issue of intervention are
21 submitted and, again, not argument or discussion but
22 additional facts, either by the staff or by he, the
23 opposing party, would have until the following Friday
24 close of business to respond to those facts.

25 We then once that is completed need to get

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1 back to you and issue an order with regard to the
2 proposed intervention, of whether or not it will be
3 granted or not, with regard to the stay, whether it
4 will be granted or not, and whether we wish to have the
5 affidavit placed under seal.

6 Is there anything else from the standpoint
7 of either Mr. Siemaszko or the staff that you wish to
8 submit to us or you believe that we need to get back
9 to you on other than those three issues at this point?

10 MS. BROCK: Not from the perspective of
11 the staff, but the staff would ask when the transcript
12 from this call is to be expected.

13 CHIEF JUDGE McDADE: It is my
14 understanding that they should be done within three
15 business days. So that should mean that by I'm
16 assuming close of business on Monday or is it close of
17 business on Tuesday? I've been advised close of
18 business Tuesday.

19 MS. BROCK: Okay.

20 CHIEF JUDGE McDADE: And this ran about
21 twice as long as I thought it would. So that gives a
22 lot for you to read in it, but, regrettably, much of
23 what I have said has been repetitive. And I apologize
24 to you all for that. So perhaps you could skim it,
25 and you won't have to read me saying the same thing

1 three times.

2 Anything further from the staff?

3 MS. BROCK: No, thank you, Your Honor.

4 CHIEF JUDGE McDADE: Or Mr. Siemaszko?

5 MS. GARDE: No, thank you, Your Honor.

6 CHIEF JUDGE McDADE: Judge Hawkens?

7 JUDGE HAWKENS: Judge Hawkens, for the NRC
8 staff, if you do file something, would you please
9 touch base with the Department of Justice and confirm
10 what I seem to remember in your prior filing,
11 expecting the investigation to be done by the end of
12 September, and just confirm that or if any change,
13 just affirmatively inform us?

14 MS. BROCK: Yes, Your Honor, we will do
15 that.

16 JUDGE HAWKENS: Thank you.

17 CHIEF JUDGE McDADE: Oh, actually, there
18 was one question that I had. In the original motion,
19 it was for a stay of 120 days. From the staff's
20 standpoint, what was the start date of that, the date
21 that the order was issued, the date that Mr. Siemaszko
22 requested a hearing? What is the date that you filed?
23 What do you view as the start of that 120 days?

24 MS. BROCK: The date we filed the motion,
25 Your Honor.

1 CHIEF JUDGE McDADE: Okay.

2 MS. BROCK: Thank you.

3 CHIEF JUDGE McDADE: That's it, I guess.

4 We will bring the hearing to a close. Thank you very
5 much. It has been very helpful.

6 (Whereupon, at 4:02 p.m., the foregoing
7 matter was adjourned.)
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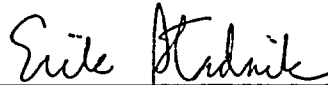
In the Matter of

Andrew Siemaszko

Docket Number: 1A-05-021

Location: teleconference

were held as herein appears, and that this is the
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