

**RAS 10182**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 07/22/05**

**SERVED 07/22/05**

Before Administrative Judges:

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

In the Matter of  
  
ANDREW SIEMASZKO

Docket No. IA-05-021  
ASLBP No. 05-839-02-EA  
July 22, 2005

MEMORANDUM AND ORDER  
(Granting the NRC Staff's Motion For A 120-Day Delay of Proceedings  
and Setting Case Schedule)

**Introduction**

On May 17, 2005, the NRC Staff filed a motion to delay the pending enforcement proceedings.<sup>1</sup> Thereafter, on May 25, 2005, this Board granted a temporary stay, noting that, without such a temporary stay, the NRC Staff would be required to produce all documents supporting its review of the proposed enforcement action within 30 days of the date of the order granting the hearing (10 C.F.R. § 2.336(b)),<sup>2</sup> which would render moot the Staff's Motion to Delay the Proceedings without a substantive ruling on the Staff's Motion. This Order constitutes a substantive ruling on the NRC Staff's Motion for Delay of Proceedings and supercedes our Order of May 25, 2005.

The threshold factual issue in this proceeding is whether, in or about April, 2000, Mr. Andrew Siemaszko engaged in deliberate misconduct (10 C.F.R. § 50.5) that caused FirstEnergy

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<sup>1</sup> NRC Staff Motion For Delay of Proceeding, May 17, 2005.

<sup>2</sup> This Board granted Mr. Siemaszko's Request for a Hearing on May 19, 2005.

Nuclear Operating Company (FENOC) to be in violation of the NRC Requirements to maintain materially complete and accurate information (10 C.F.R. § 50.9).<sup>3</sup> Specifically, in order to sustain the suspension order, the NRC Staff must prove that Mr. Siemaszko deliberately provided materially incomplete and inaccurate information when he prepared CR No. 2000-1037 and Work Order No. 00-001846-000. More specifically, the NRC Staff must prove that, in preparing CR No. 2000-1037 and Work Order No. 00-001846-000, Mr. Siemaszko intentionally provided an incomplete and inaccurate description of the work activities and corrective actions taken relative to the presence of boric acid deposits on the RPV head knowing that by doing so he would cause FENOCO to be in violation of NRC Regulations. Further, in the event that the Board concludes that the NRC Staff has proven that Mr. Siemaszko did engage in deliberate misconduct, this Board must determine whether, in light of all relevant aggravating, extenuating, and mitigating circumstances, the proposed sanction, a 5-year suspension, should be imposed as requested by the NRC Staff or whether, in the alternative, it should be mitigated or remitted.<sup>4</sup>

The NRC Staff has requested a delay in this enforcement proceeding of 120 days (from May 17, 2005, until September 14, 2005). It makes this request based on the representation that the facts underlying this enforcement action, as outlined above, are also at the center of a criminal investigation which is ongoing in the Northern District of Ohio.<sup>5</sup> The NRC Staff has stated that a

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<sup>3</sup> By materially complete we mean that the failure of the records to be complete and accurate had a natural tendency or capacity to influence agency (NRC) action. Virginia Elec. & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491 (1976), aff'd, 571 F.2d 1289 (4th Cir. 1978).

<sup>4</sup> Absent objection by a party, and reconsideration by this Board, the preceding issues will constitute the total scope of this proceeding.

<sup>5</sup> According to the Affidavit submitted by the NRC Staff, in the summer of 2001, the NRC asked FENOC questions concerning the potential that its pressurized water reactors had, or would develop, vessel head leaks and that Mr. Siemaszko helped prepare FENOC's responses. Further, the affidavit stated that the truthfulness of those responses is the matter that was referred to the Department of Justice for investigation. See Ballantine Affidavit at 2-3. While the factual focus of this enforcement action and the ongoing criminal investigation differ somewhat, they clearly overlap.

delay of 120 days will allow the criminal investigation to be completed without the interference that could possibly result from the discovery rules applicable in NRC proceedings. See 10 C.F.R. § 2.336(b).

### **Analysis and Conclusions**

A request for a delay of these proceedings requires a balancing of competing interests, the interests of the person affected by the agency action and the public interest. See Oncology Services Corp., CLI-93-17, 38 NRC 44, 49-50. (1993). Accordingly, in this case we must weigh Mr. Siemaszko's due process right to a prompt resolution of the allegations laid against him in this NRC's enforcement action against the potential that, absent the requested delay, this proceeding will interfere with an ongoing criminal investigation.

Mr. Siemaszko has a clear interest in the prompt resolution of these proceedings. Until these proceedings are concluded, Mr. Siemaszko is, de facto, unemployable in the nuclear industry and, as a result, he suffers a significant diminution in his earning capacity every day until this matter is resolved. In this regard, the Commission Order is functionally equivalent to an immediately effective order, and that factor mitigates in favor of expediting this proceeding. See 10 C.F.R. § 2.202(c)(1).

If the NRC Staff is unable to prove that Mr. Siemaszko engaged in deliberate misconduct, the suspension order must be set aside and a significant impediment to the future employment of Mr. Siemaszko in the nuclear industry will be ended. Alternatively, if the NRC Staff meets its burden of proof and the suspension order is upheld (either in whole or in part) the sooner the Order becomes effective, the sooner the period of suspension will be over. Accordingly, regardless of the ultimate result, Mr. Siemaszko has a strong interest in the prompt resolution of this matter.

Likewise, the government has a clear interest in the investigation of possible criminal activity, and should be given a reasonable time to conduct such investigations. In support of its

motion, the NRC Staff has submitted an affidavit signed by an attorney employed by the Department of Justice which states that, in an effort to determine whether there had been violations of 18 U.S.C. § 371 or § 1001, this matter has been under active investigation since at least November 2003.<sup>6</sup>

Since the actions of Mr. Siemaszko which are the focus of the ongoing criminal investigation occurred in 2001 (4 years ago)<sup>7</sup> and this matter has been under active investigation by the Department of Justice for more than 20 months,<sup>8</sup> a decision whether to bring criminal charges against Mr. Siemaszko must be made in the near term. Moreover, it is reasonable to presume that this matter has been diligently pursued and, accordingly, the ongoing investigation is near completion. Therefore, we grant the NRC Staff's request for a 120-day delay so that this administrative enforcement action will not interfere with the Department of Justice's investigation leading to a decision whether to pursue criminal charges arising from the Davis-Besse matter.

The Board grants the NRC Staff's Motion to the following extent. The NRC Staff is not required to provide the documents supporting its' review of the proposed enforcement action, or to provide any other discovery in this proceeding, prior to September 14, 2005. However, on that date, absent a subsequent Order from this Board, the NRC Staff will produce those documents specified at 10 C.F.R. § 2.336(b), and the timing for all other discovery milestones are adjusted accordingly. Likewise, parties other than the NRC Staff will make their initial disclosures pursuant to 10 C.F.R. § 2.704(a) on or before September 14, 2005.

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<sup>6</sup> See Affidavit of Thomas T. Ballantine, May 16, 2005.

<sup>7</sup> See NRC Motion For Delay of Proceedings, May 17, 2005, at page 2, and NRC Order, April 21, 2005, at page 3. 83 Fed. Reg. 22719 (2005)

<sup>8</sup> The standard term for a Grand Jury is 18 months, see 18 U.S.C. § 3331, and the generally applicable statute of limitations is 5 years, see 18 U.S.C. § 3282.

Any additional discovery, beyond the mandatory disclosures, must be requested in writing and served on the opposing party via e-mail on or before October 3, 2005. See 10 C.F.R. § 2.705. Responses to these additional discovery requests will be served by both parties via e-mail on or before October 17, 2005. If either party has any objection to the requested discovery, or concludes that they will need additional time beyond October 17, 2005, to respond to these additional discovery requests, such objections, or requests for an extension of time, must be served on the opposing party via e-mail and filed on or before October 10, 2005.

All motions, except motions relating to cross-examination, must be served on the opposing party via e-mail and filed on or before October 31, 2005. If either party concludes that they need additional time beyond October 31, 2005, within which to prepare and file motions, such requests for an extension of time must be served on the opposing party via e-mail and filed no later than October 24, 2005. Absent a modification to this schedule ordered by this Board, written responses to substantive motions must be served on the opposing party via e-mail and filed no later than November 14, 2005.

Written direct testimony, and initial exhibit lists, will be served on the opposing party via e-mail and filed on or before November 30, 2005. Written rebuttal testimony, and supplemental exhibit lists, must be served on the opposing party via e-mail and filed no later than December 14, 2005. See 10 C.F.R. § 2.711(b). If a party may need a subpoena to be issued in order to secure the presence of a witness or the production of evidence, that party shall notify the Board in writing of the name and last known address of the proposed witness or custodian of evidence, along with a brief explanation of the relevance of the proposed witnesses testimony or the evidence to be produced. This notice will be served on the opposing party via e-mail. See 10 C.F.R. § 2.702.

Motions regarding cross-examination and cross-examination plans will be served on the opposing party via e-mail and filed on or before January 11, 2006. See 10 C.F.R. § 2.711(c).

The time and date for a second Prehearing Conference to be held via telephone will be set by a subsequent Order of this Board. It is our intent that such a Prehearing Conference be held during the week of January 16, 2006. If, prior to that date, either party concludes that an earlier Prehearing Conference would materially aid in the expeditious and fair resolution of this matter, they should serve on the opposing party via e-mail and file a motion to request a Prehearing Conference. Such a motion should include a brief explanation of the matters which the moving party wishes to raise at the proposed Prehearing Conference and an explanation of why, in the moving party's judgment, the expeditious and fair resolution of this proceeding would be materially aided by such a Prehearing Conference. It is the intent of this Board that during the Prehearing Conference to be held during the week of January 16, 2006, we will hear argument on any unresolved motions, resolve any other matters that may have arisen, establish the procedures and finalize the scope of the hearing, and set a time and date for the hearing to be held in or near Oak Harbor, Ohio during February 2006.<sup>9</sup>

Although we have granted the NRC Staff's Motion for Delay, we note that, in light of Mr. Siemaszko's strong interest in the prompt resolution of this proceeding, we are disinclined to grant any further delays absent the most compelling of reasons.<sup>10</sup> By mid-September the decision

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<sup>9</sup> It is the responsibility of the parties to insure that Mr. Rund, the Board's Law Clerk, has the telephone number at which they can be reached at the time to be set for the January 2006, Prehearing Conference. Mr. Rund's phone number, e-mail address, and mail address have previously been provided to the parties. If either party can not be available for a Prehearing Conference at any time between the hours of 11:00 AM EST and 5:00 PM EST, during the week of January 16, 2006, they must notify this Board, and the opposing party, in writing no later than December 30, 2005, of the times during that week when they would not be available and the reason that they would not be available at those times.

<sup>10</sup> Whether to further delay these proceedings would be a matter within the discretion of this Board. See SEC v. Drexel Burnham Lambert Inc., 128 F.R.D. 47, 48-51 (S.D.N.Y. 1989). Recognizing that the protection of the public through the vigorous enforcement of the criminal laws is an important public policy, in deciding whether to permit the administrative proceeding to go forward we would consider whether that course would interfere with, or jeopardize, an ongoing criminal proceeding. Since the factors which have traditionally been emphasized when the government has been granted a delay of civil or administrative proceedings have been the potential for witness intimidation, perjury, or the manufacture of evidence by the defendant, see Founding Church of Scientology v. Kelley, 77 F.R.D.

whether to bring criminal charges against Mr. Siemaszko will have been made. If no charges are brought, there will be no reason to delay these proceedings. Alternatively, if an Indictment is handed up, it could be a considerable period before those charges are taken to trial and, in the judgment of this Board, going forward with this administrative proceeding after charges are filed would likely have little, if any, adverse effect on the government's ability to prosecute its case.<sup>11</sup>

While discovery under 10 C.F.R. § 2.336 is procedurally different from the discovery procedures under Rule 16, Fed. R. Crim. P., given the circumstances presented here we are able to foresee little, if any, prejudice to the prosecution that would be caused by allowing discovery to go forward in this administrative proceeding after an Indictment has been returned.<sup>12</sup> However, Mr. Siemaszko would clearly be prejudiced if this proceeding were to be delayed for an indefinite, but certainly lengthy period, between the return of an indictment and the trial.

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378 (D.C.D.C. 1977); United States v. Hogo Key and Son, Inc., 672 F. Supp. 656, 658 (D. R.I. 1987); Nakash v. U.S. Department of Justice, 708 F. Supp. 1354, 1365-66 (S.D.N.Y. 1988), unless the NRC Staff demonstrates that those factors are present, it is unlikely that we would grant any further delay.

<sup>11</sup> In determining the potential impact which going forward with this administrative proceeding could have on a criminal prosecution, the Board draws on more than 45 years of personal experience at the Department of Justice. More specifically, the Board Chairman spent more than 25 years prosecuting complex regulatory crimes as a Department of Justice Attorney.

<sup>12</sup> Once the government has satisfied its post-indictment discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); and Rule 16, Fed. R. Crim. P., there will be little, if any, material difference between the information received through the criminal discovery procedures and the discovery received through this administrative proceeding.

If any party has any objection to any aspect of this Order, those objections must be served on the opposing party via e-mail and filed no later than August 5, 2005.

IT IS SO ORDERED.<sup>13</sup>

FOR THE ATOMIC SAFETY AND LICENSING BOARD

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LAWRENCE G. McDADE, Chairman  
Administrative Judge

Rockville, Maryland  
July 22, 2005

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<sup>13</sup> Copies of this order were sent this date by Internet e-mail transmission to: (1) Counsel for Mr. Siemaszko, (2) the Union of Concerned Scientists; (3) Ohio Citizen Action; and (4) Counsel for the NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
ANDREW SIEMASZKO ) Docket No. IA-05-021  
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(Enforcement Action) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING THE NRC STAFF'S MOTION FOR A 120-DAY DELAY OF PROCEEDINGS AND SETTING CASE SCHEDULE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 22<sup>nd</sup> day of July 2005