

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

August 12, 2005 (4:13pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

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

<p><i>In the Matter of</i></p> <p>ANDREW SIEMASZKO</p>	<p>Docket No. IA-05-021</p> <p>ASLBP No. 05-839-02-EA</p> <p>August 12, 2005</p>
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**RESPONSE OF OHIO CITIZEN ACTION AND UNION OF CONCERNED
SCIENTISTS REGARDING DISCRETIONARY STANDING AND REPRESENTATION**

On August 2, 2005, the Board issued a Memorandum and Order in this proceeding soliciting the position of Ohio Citizen Action and the Union of Concerned Scientists (UCS) on two points: (a) discretionary standing and (b) single representation by Mr. David Lochbaum of both Ohio Citizen Action and UCS.

Regarding the representation question, Mr. Lochbaum has been a paid member of the UCS staff since October 1996. UCS provides full-time employment for Mr. Lochbaum and, in fact, tasks him with responsibility to pursue issues such as this proceeding. According to the Ohio Citizen Action website (www.ohiocitizen.org), a member is defined as "Anyone who shares Ohio Citizen Action's purposes and has contributed at least \$10 is a member." Mr. Lochbaum has donated \$25 to Ohio Citizen Action (receipt – with credit card number redacted – available upon request) and shares Ohio Citizen Action's purposes at least with respect to the Davis-Besse nuclear plant. Previous filings did not explicitly detail information showing Mr. Lochbaum's membership in both Ohio Citizen Action and UCS, but we provide it now with our request that the Board allow use to proceed with a single representative.

Template = SECY-037

SECY-02

Regarding discretionary standing, our prior filings were, as the Board observed, ambiguous with respect to discretionary standing. We sincerely believed that we had sufficient basis to participate in the proceeding as a party and focused on those reasons. We included a discussion about discretionary standing in case the Board decided we did not meet the criteria in 10 C.F.R. § 2.309(d) for standing as a party.

The Board sought our unequivocal statement whether we wish the Board to consider discretionary intervention. Ohio Citizen Action and UCS do ask the Board to exercise its discretion and allow us to participate in the proceeding. Per the Board's direction, we provide the following arguments to address the factors in 10 C.F.R. § 2.309(e):

At least one admissible contention is involved

Footnote 20 in the August 2nd Order conveyed the Board's decision that Ohio Citizen Action and UCS, if granted discretionary intervention, in the proceeding, would be limited to litigating Contentions 2, 3, and 5 as defined there. While we recognize that statement does not represent the Board's final ruling on the matter, we point to these contentions as evidence for meeting this factor in 10 C.F.R. § 2.309(e).

The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record

In its August 2, 2005, Order, the Board explained the two determinations it might make in this proceeding. The first determination is whether 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." Ohio Citizen Action and UCS possess transcripts and summaries of interviews conducted by the NRC Office of the Inspector General (OIG) of NRC and FirstEnergy staff members. The interviews covered the cleaning and inspection of the RPV head during the refueling outage at Davis-Besse in 2000. These documents were obtained via a request under the Freedom of

Information Act. It is our understanding that these documents are not publicly available from the NRC. In fact, earlier this year the NRC OIG contacted UCS and requested that one of these documents be removed from its posting on the UCS website (www.ucsusa.org). The NRC OIG told UCS that the U.S. Department of Justice had contacted them with the concern that public availability of this document could compromise DOJ's ongoing criminal investigation. UCS complied with the NRC OIG request. In addition, Ohio Citizen Action and UCS have monitored events at Davis-Besse quite closely since the reactor vessel head damage was announced in March 2002. UCS even retained outside counsel who reviewed publicly available documents and prepared a legal memo for UCS outlining potential culpability related to conditions at Davis-Besse. Ohio Citizen Action and UCS teamed up to present that legal memo and its findings to the Attorney General's office in Ohio. Many documents exist regarding conditions at Davis-Besse. Ohio Citizen Action and UCS have acquired a deep and thorough understanding of the information within these documents and are well-equipped to match applicable documents to the issues within the scope of this proceeding. Inclusion of Ohio Citizen Action and UCS in the proceeding will therefore help ensure that all pertinent documents are placed on the record.

If and only if the Board determined that Mr. Siemaszko had provided incomplete and inaccurate information, it would then determine whether the five-year suspension should be imposed. Ohio Citizen Action and UCS do not expect the Board will have to make this determination. But if it becomes necessary, we have extensive knowledge about the NRC's enforcement actions against individuals, as detailed in our prior filings, which will help ensure a complete record for the Board's deliberations. For example, UCS issued a report in April 2001 entitled "Nuclear Regulatory Commission Enforcement Policy and Practices Regarding Nuclear Plant Workers Who Violated Federal Safety Regulations in 1999 and 2000." Mr. Lochbaum was invited on at least two occasions by the NRC to be on panels it formed to examine the question of alternate dispute resolution of proposed sanctions. We possess considerable institutional knowledge of the NRC enforcement policy and its implementation to help the Board determine whether the sanction proposed by the NRC staff in this proceeding is appropriate.

The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding

Ohio Citizen Action and UCS detailed the nature and extent of our interest in the proceedings in our prior filings.

The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest

Ohio Citizen Action and UCS detailed in our prior filings the reasons why we believe the proposed sanction against Mr. Siemaszko is wrong and why it conflicts with our interests.

The availability of other means whereby the requestor's/petitioner's interest will be protected

Ohio Citizen Action and UCS contend (see Contention 5 as stated in footnote 20 to the Board's August 2nd Order) that the proposed sanction against Mr. Siemaszko is inappropriate given a statistically significant number of lighter sanctions – or even no sanctions – imposed on individuals determined by NRC to have committed equally or more severe violations. Intervention in this proceeding is the only opportunity we have to remedy this error. We have no other recourse.

The extent to which the requestor's/petitioner's interest will be represented by existing parties

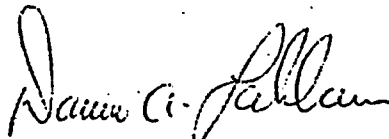
It is clear that the interests of Ohio Citizen Action and UCS related to Contentions 2, 3, and 5 in this proceeding are more closely aligned with those of Mr. Siemaszko than those of the NRC staff. Mr. Siemaszko has counsel in this proceeding to represent his interests. We expect that Mr. Siemaszko will primarily pursue these shared or overlapping interests and that our level of engagement during the proceeding will be limited to supplementing that effort on occasion. Related to the arguments we provided in addressing the “developing a sound record” factor above, we believe there are aspects to this

proceeding that will benefit from our acknowledged minor role. By extension, Mr. Siemaszko alone might not be able to cover these aspects to produce that sound record absent our participation.

The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding

Ohio Citizen Action and UCS understand and readily accept the Board's point as expressed in footnote 21 in its August 2nd Order that this proceeding is not the proper process to pursue redress of any deficiencies we perceive in the NRC's enforcement policy or to seek sanctions against other individuals. We intend to stay well within the bounds of this proceeding. In doing so, we envision obtaining a sound record that the Board seeks that will provide us the body of information needed to pursue fixing the enforcement policy through direct engagement with the NRC staff and other processes available to us outside of this proceeding. Regarding any sanctions we may feel are warranted for other individuals, we have used the 10 C.F.R. § 2.206 petition process in the past to seek enforcement actions, including sanctions against individuals, and would use that process rather than this proceeding.

Sincerely,



David A. Lochbaum

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

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

<i>In the Matter of</i> ANDREW SIEMASZKO	Docket No. IA-05-021 ASLBP No. 05-839-02-EA June 24, 2005
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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF OHIO CITIZEN ACTION AND UNION OF CONCERNED SCIENTISTS REGARDING DISCRETIONARY STANDING AND REPRESENTATION" in the above captioned proceeding have been served on the following persons by deposit in the United States mail and by electronic mail on this 12th day of August, 2005.

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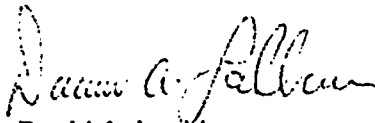
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