

August 19, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	IA-05-021
	)	
ANDREW SIEMASZKO	)	ASLBP No. 05-839-02-EA
	)	

NRC STAFF MOTION TO EXTEND THE STAY OF THE PROCEEDING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Staff of the Nuclear Regulatory Commission (Staff), at the request of the Department of Justice (DOJ), moves the Atomic Safety and Licensing Board for an order further staying all proceedings in the matter for an additional seventy-seven (77) days, until November 30, 2005, subject to the possibility of a request for an extension of time. Pursuant to 10 C.F.R. § 2.323(b) counsel for the Staff contacted counsel for Mr. Siemaszko to attempt to resolve the issue. Counsel for Mr. Siemaszko is opposed to staying this proceeding.

BACKGROUND

Andrew Siemaszko, was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by FirstEnergy Nuclear Operating Company (FENOC). On April 21, 2005, the Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities" (Order) to Mr. Siemaszko. 83 Fed. Reg. 22719 (2005).

The Order prohibits Mr. Siemaszko from any involvement in NRC-licensed activities for a period of five years from the effective date of the Order.<sup>1</sup>

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<sup>1</sup> Since the Order was not immediately effective and a hearing was requested, the Order is not effective until the conclusion of the hearing process.

On April 22, 2005, Mr. Siemaszko filed his "Request for a Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities," (Hearing Request) and denied the allegations contained in the Order. On May 17, 2005 the NRC Staff filed a "Motion for Delay of Proceeding." On July 22, 2005 the Board issued an Order "Granting the NRC Staff's Motion for a 120-Day Delay of Proceedings and Setting Case Schedule." For the reasons set forth below, the Staff moves the Board for an additional stay of the above captioned proceeding.

### DISCUSSION

#### A. Legal Standards Governing Stays of Proceedings

The Commission's regulations at 10 C.F.R. § 2.202(c)(2)(ii) permit a presiding officer to stay a hearing of an immediately effective order when good cause exists.<sup>2</sup> The Commission has previously held that the determination of whether good cause exists for a stay requires a balancing of competing interests. See *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 50 (1993). The factors to be considered in balancing these interests are; the length of delay, the reason for the delay, the affected individual's assertion of his right to a hearing, prejudice to the affected person, and the risk of an erroneous deprivation. See *Id.* Those factors are discussed below.

##### 1. Length of and Reason for Stay

The first factor, length of the stay, and the second factor, the reason for the stay, are closely related. In the instant proceeding, the total length of the stay of the proceeding, including the current request for an additional seventy-seven day stay, will be approximately 8 months from the issuance of the Order. Stays of more than 8 months have been routinely

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<sup>2</sup> The instant case is not an immediately effective order. When the Staff has issued an immediately effective order and requests a stay, a person subject to the Order suffers a legally cognizable harm during the pendency of the stay request and hearing. In the instant case, Mr. Siemaszko has not yet suffered any legally cognizable harm, therefore the standard for granting a stay should be somewhat more lenient. The NRC Staff respectfully disagrees that the Order against Mr. Siemaszko is functionally equivalent to an immediately effective order.

upheld. See *Oncology Services Corp.*, LPB-93-20, 38 NRC 130 (1993) (The Staff was granted a total stay of 11 months in *Oncology*, the Order was issued on January 20, 1993 and the final stay was granted through December 6, 1993). See also *United States v. U.S. Currency in the Amount of \$228, 536.00*, 895 F.2d 908, 917 (2<sup>nd</sup> Cir. 1990) (forfeiture action commenced after stay of almost four years). The reason for the stay and the length of the stay are due to the pendency of grand jury proceedings. See *Affidavit Thomas T. Ballantine* (Ballantine Affidavit) at 5.<sup>3</sup> Administrative policy gives priority to the public interest in law enforcement and a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims. See *Campbell v. Eastland*, 307 F.2d 478, 487 (5<sup>th</sup> Cir. 1962); *United States v. Hugo Key and Son*, 672 F. Supp. 656 (D. RI 1987).

In promulgating its rules on challenges to orders the Commission explicitly included a provision allowing the presiding officer to stay a hearing for good cause. See Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20194, 20197 (May 12, 1992). The Commission specifically noted that the pendency of a criminal investigation was an example of good cause for staying an administrative hearing. *Id.* Moreover, the Memorandum of Understanding between the NRC and the Department of Justice reflects that the Staff will seek a stay of discovery and hearing rights during the regulatory proceeding to accommodate the needs of a criminal investigation or prosecution. See MOU Between the NRC and DOJ, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988). The NRC Staff seeks a stay consistent with the MOU in order to protect the criminal proceeding, a strong governmental interest.

Furthermore, in the instant case the scope of discovery in the civil case vastly exceeds

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<sup>3</sup>The *Ballantine Affidavit* is filed under seal and contains additional detail in support of the motion. Since the *Ballantine Affidavit* is under seal it is not included in the electronic version of this filing.

the scope of discovery in the criminal case. Pursuant to 10 CFR § 2.705-2.708 a litigant in an enforcement proceeding is entitled to a full range of civil discovery methods including interrogatories, document requests, and depositions. The parties in the instant case anticipate utilizing these discovery methods. See Scheduling Order Setting a 120 Day Discovery Schedule, August 11, 2005. It is well established that a litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit to avoid the restrictions on criminal discovery and thereby obtain documents he might not otherwise be entitled to for use in his criminal suit. See *Campbell* at 487; *Founding Church of Scientology v. Kelley*, 77 FRD 378, 380 (D. DC 1977). The current scheduling order in the civil case will necessitate the Staff disclosing its 10 C.F.R. § 2.336 documents, including the OI report, on September 19, 2005. The Staff is then required to serve additional written discovery by October 14, 2005 and respond to discovery requests by November 23, 2005. Pursuant to the current schedule, this will occur during the pendency of the Grand Jury investigation. See *Ballantine Affidavit* at 5. The Staff seeks a stay in furtherance of the strong governmental interest in protecting the criminal proceeding.

Since the additional stay is brief, and there is a strong governmental interest in protecting the criminal investigation, these factors weigh heavily in favor of the Staff.

2. Mr. Siemaszko's Assertion of the Right to a Hearing and Prejudice

The second two factors in the balancing test are Mr. Siemaszko's assertion of the right to a hearing and prejudice to Mr. Siemaszko. The Staff does not dispute that Mr. Siemaszko has requested a prompt hearing, therefore this factor weighs in favor of Mr. Siemaszko. The last factor, prejudice to Mr. Siemaszko weighs neither for or against Mr. Siemaszko. Mr. Siemaszko is, quite simply, not prejudiced by a stay in the proceeding. While it is true that Mr. Siemaszko is not currently employed in the nuclear industry, this condition existed prior to the issuance of the Staff Order in April. Mr. Siemaszko was terminated from employment at

Davis-Besse in September, 2002 and has not been successful in becoming re-employed in the nuclear industry. See *Pre-Hearing Conference*, June 16, 2005, *Transcript* at 61-62. The Order to Mr. Siemaszko was not made immediately effective, so Mr. Siemaszko is not prohibited from employment in the nuclear industry during the pendency of this proceeding. Therefore, these two factors weigh only slightly in favor of Mr. Siemaszko.

3. Risk of Erroneous Deprivation

The final factor is risk of erroneous deprivation. This factor weighs heavily in favor of the Staff. Since the Order was not immediately effective, Mr. Siemaszko has not yet been deprived of anything. Mr. Siemaszko has not yet suffered a change in legal status or any other legally cognizable harm as a result of the Order. Therefore, this factor weighs heavily in favor of the Staff.

CONCLUSION

On balance, the factors establish that good cause exists for an additional stay of the proceeding through November 30, 2005. There is an overriding public interest, the pending grand jury investigation, which justifies the delay, and there is no risk of erroneous deprivation, since the order is not immediately effective. The Staff's motion for a stay should, therefore, be granted.

Respectfully submitted,

*/RA/*

Sara E. Brock  
Melissa L. Duffy  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 19<sup>th</sup> day of August, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION TO EXTEND THE STAY OF THE PROCEEDING" in the above captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*) on this 19<sup>th</sup> day of August, 2005. The "AFFIDAVIT OF THOMAS T. BALLANTINE, TRIAL ATTORNEY" filed under seal has been served through hand-delivery as indicated by a pound sign (#).

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