

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
)	

APPLICATION FOR A TEMPORARY STAY TO PRESERVE THE STATUS QUO

INTRODUCTION

Pursuant to 10 C.F.R. § 2.342(f) the Staff of the Nuclear Regulatory Commission (Staff), moves the Atomic Safety and Licensing Board for an immediate temporary stay of the Order (Granting Joint Motion to Modify the Discovery Schedule and Setting New Discovery Schedule) dated August 11, 2005 (Order), to preserve the status quo pending a ruling on the NRC Staff Motion to Extend the Stay of the Proceeding dated August 19, 2005 (Staff Motion). Pursuant to 10 C.F.R. § 2.342(f) and 2.323(b) counsel for the Staff contacted counsel for Mr. Siemaszko to attempt to resolve the issue. Counsel to Mr. Siemaszko indicated that she was opposed to any further delay of the proceeding.

BACKGROUND

On April 21, 2005, the Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities" to Mr. Siemaszko. 83 Fed. Reg. 22719 (2005). On April 22, 2005 Mr. Siemaszko filed his "Request for a Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities" (Hearing Request). 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." On August 11, 2005 the Board issued an Order "Granting Joint Motion to Modify the Discovery Schedule and Setting New

Discovery Schedule.” Pursuant to the August 11, 2005 Order, the Staff is required to produce those documents specified at 10 C.F.R. § 2.336(b) on September 19, 2005. On August 19, 2005 the Staff filed “NRC Staff Motion to Extend the Stay of the Proceeding.” (Staff Motion) For the reasons set forth below, the Staff moves for a temporary stay of the August 11, 2005 Order until the Board has ruled on the Staff Motion.

DISCUSSION

In extraordinary cases a presiding officer is allowed to grant a temporary stay to preserve the status quo without waiting for filing of any answer. See 10 C.F.R. § 2.342(f). The standards for granting such a stay are the same as the traditional stay standards found in 10 C.F.R. § 2.342(e). The instant case, involving the release of Staff documents that were referred to the Department of Justice for consideration of criminal prosecution, is one of the extraordinary situations contemplated by the rule. A temporary stay is necessary here to prevent irreparable injury to the criminal proceeding. Once the documents are released, the damage cannot be undone. See *e.g. Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-05, 39 NRC 190, 193 (1994) (adverse impact of release of documents otherwise held in confidence is “irreparable and could not be alleviated through future review...”). Granting a temporary stay in the instant case will avoid irreparable injury to the United States, will not harm other parties, and is in the public interest. Additionally, there is a strong likelihood that the Staff will prevail on the Motion to Extend the Stay of the Proceeding.

1. Irreparable Injury

The factor which is most crucial to the granting of a temporary stay is the question of irreparable injury to the movants if the stay is not granted. See *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 797 (1981). In the

instant case, the Staff has demonstrated irreparable injury. The requirements of 10 C.F.R. § 2.336(b) are broad. The Staff is required to produce “all documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff’s review of the application or proposed action that is the subject of the proceeding; [and] any NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC staff’s determination on the application or proposal that is the subject of the proceeding.” See 10 C.F.R. § 2.336(b)(3 & 4). If the Staff is required to produce documents prior to a ruling on the Staff Motion, the interests of the United States will be irreparably injured. If a temporary stay is not granted, the Staff will be required to produce the Office of Investigations Report and other documents on September 19, 2005.

2. Harm to Other Parties and Public Interest

In the instant application, the Staff is solely requesting a Stay of the Board Order such that the Staff obligations under 10 C.F.R. § 2.336(b) are not triggered until such time as the Board rules on the Staff Motion to Extend the Stay of the Proceeding. The requested temporary stay to preserve the status quo will not harm the other parties since it is brief in nature. The stay is within the public interest in that it will allow for a ruling on the Staff Motion.

3. Likelihood of Prevailing on the Merits

The need to demonstrate success on the merits varies according to the tribunal’s assessment of other factors that must be considered in determining if a stay is warranted. See *Public Service Co. Of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977) citing *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977). Tribunals may issue stays when there is a difficult legal question and the equities in the case suggest that the status quo should be maintained. See *Holiday Tours* at 844-845. In the instant case, the Staff believes that it has made a strong case on the merits, in its Motion. The Commission has historically delayed

administrative enforcement proceedings when the same subject matter is being reviewed for potential criminal action. See *e.g. Oncology Services Corp.*, CLI-93-17, 38 NRC 44 (1993). However, it is not necessary for the Board to prejudge the outcome of the Motion to Extend the Stay in order to grant the Staff's application for a temporary stay.

CONCLUSION

For the foregoing reasons the Staff submits that a temporary stay to preserve the status quo is appropriate and necessary in this case.

Respectfully submitted,

/RA/

Sara E. Brock
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of August, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICATION FOR A TEMPORARY STAY TO PRESERVE THE STATUS QUO" 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 19th day of August, 2005.

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