

August 29, 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 PARTIAL OBJECTION TO BOARD ORDER AND
MOTION TO CLOSE THE PREHEARING CONFERENCE

INTRODUCTION

Pursuant to the Board Order dated August 24, 2005, the Staff of the Nuclear Regulatory Commission (Staff) hereby notes a partial objection to the Board Order and moves to close the prehearing conference scheduled for Tuesday, August 30th at 2 p.m. Pursuant to 10 C.F.R. § 2.323(b) Counsel for the NRC Staff contacted counsel for Mr. Siemaszko to attempt to resolve the issue of closing the prehearing conference. Counsel for Mr. Siemaszko indicated opposition to closing the prehearing conference.

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.¹

¹ 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." On August 19, 2005, the NRC Staff filed "NRC Staff Motion to Extend the Stay of Proceedings." Attached to the Staff filing was an affidavit from the Department of Justice which was filed under seal. On August 24, 2005, the Board issued an Order "Scheduling Prehearing Conference." For the reasons set forth below the NRC Staff notes a partial objection and moves for the prehearing conference to be closed.

DISCUSSION

1. Partial Objection to Board Order

On August 19, 2005, the NRC Staff filed a "NRC Staff Motion to Extend the Stay of Proceedings." The Staff attached an affidavit from Department of Justice trial attorney Thomas T. Ballantine (Ballantine Affidavit). The Ballantine Affidavit was filed under seal pursuant to the Commission's policy on Investigations, Inspections, and Adjudicatory Proceedings. Pursuant to that policy, the Staff indicated it's willingness to allow Mr. Siemaszko access to the Ballantine Affidavit if Mr. Siemaszko would sign the confidentiality and non-disclosure agreement included with the Staff filing.

On August 24, 2005, the Board issued an order scheduling a prehearing conference. Among the topics for the prehearing conference was the following; "determine the willingness of Mr. Siemaszko and Ohio Citizen Action and the Union of Concerned Scientists (OCA/UCS) to enter into the Confidentiality and Non-Disclosure Agreement pursuant to the Proposed Protective Order." The NRC Staff objects to the release of the Affidavit to OCA/UCS. The OCA/UCS petition to intervene in this proceeding was specifically denied by the Board on

August 2, 2005. See *Memorandum and Order "Ruling Denying the Request for Hearing of Ohio Citizen Action/ Union of Concerned Scientists and Requesting Briefs on the Appropriateness of Discretionary Intervention."* On August 12, 2005, OCA/UCS filed a request for discretionary intervention. However, this petition has not been granted. OCA/UCS are "parties" to this proceeding only to the very narrow and limited extent of their pending motion that they be permitted to participate as a matter of discretion, and for no other purpose. Thus, they are not entitled to and should not be afforded access to the sensitive information at issue here. Furthermore, OCA/UCS have not previously participated in the stay portions of the proceeding. OCA/UCS did not file responses to the NRC Staff previous motion to stay the proceeding, nor did they participate in the portion of the previous prehearing conference regarding the stay. Since OCA/UCS are not a party to the proceeding, the NRC Staff objects to any release of the Ballantine Affidavit to OCA/UCS.² Moreover, the NRC Staff notes that pursuant to the Commission's policy on Investigations, Inspections, and Adjudicatory Proceedings, if the Board decides to release the contents of a sealed filing and the Staff disagrees with the release, the matter must be referred to the Commission. See 49 FR 36034.

2. Motion to Close the Prehearing Conference

The August 24th Board Order asked the NRC Staff to be prepared to discuss "with a degree of specificity not present in the Ballantine Affidavit, how the release of those documents could possibly interfere with the ongoing investigation being conducted by the Department of Justice." See August 24, 2005 Order at 1-2. In light of this request, the NRC Staff requests that the prehearing conference be closed to the public. The NRC Staff filed the Ballantine Affidavit under seal. To the extent the Board intends to question the Staff regarding the content of the Ballantine Affidavit, or to seek details of the Department of Justice's investigation that

² The NRC Staff consulted with the Department of Justice and confirmed that they object to any release of the Ballantine Affidavit to OCA/UCS.

exceed the content of the Ballantine Affidavit, the NRC Staff asks that it be done in a closed prehearing conference.³

CONCLUSION

Therefore, the NRC Staff objects to the provision of the Ballantine Affidavit to the OCA/UCS and moves to close the prehearing conference.

Respectfully Submitted,

/RA/

Sara E. Brock
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of August, 2005

³To the extent the Board wishes to seek information regarding the details of the Department of Justice's investigation, the Staff wishes to note that the Staff is not privy to the details of the Department of Justice investigation and any additional information the Staff is able to provide to the Board will be limited.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF PARTIAL OBJECTION TO BOARD ORDER AND MOTION TO CLOSE THE PREHEARING CONFERENCE" 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 29th day of August, 2005.

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