

RAS 10412

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

DOCKETED
USNRC

August 29, 2005 (3:58pm)

Before Administrative Judges:

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

August 29, 2005

**REPLY OF ANDREW SIEMASZKO IN SUPPORT OF REQUEST BY
UNION OF CONCERNED SCIENTISTS AND OHIO CITIZEN ACTION
FOR DISCRETIONARY INTERVENTION**

Andrew Siemaszko hereby supports the request of Petitioners Union of Concerned Scientists ("UCS") and Ohio Citizen Action ("OCA") for discretionary intervention in this enforcement action against him, pursuant to 10 C.F.R. §2.309(e).

BACKGROUND

Mr. Siemaszko, a former engineer of First Energy Nuclear Operating Company ("FENOC" or "the licensee") at the Davis-Besse nuclear power plant in Ohio, is the target of an NRC enforcement action to bar him from employment in the nuclear industry for five years. See, generally, April 21, 2005, *Order Prohibiting Involvement In NRC-Licensed Activities*, IA 05-021. In accordance with the rights provided to Mr. Siemaszko by the United States Constitution and implemented through regulations of the Nuclear Regulatory Commission ("NRC"), before being stripped of his livelihood Mr. Siemaszko, upon request, is entitled to a hearing. Mr. Siemaszko requested such a hearing, and an Atomic Safety and Licensing Board ("ASLB" or "the Board")

TEMPLATE = SECY-037

SECY-02

was constituted to adjudicate the matter. Two public interest organizations, the Union of Concerned Scientists (UCS) and Ohio Citizen Action (OCA) sought admission to the hearing as intervenors as a matter of right, which has been denied by the Board; however, the Board sought information on the appropriateness of admitting the Petitioners as a matter of discretion. See, August 2, 2005, *Memorandum and Order (Ruling Denying the Request for Hearing of Ohio Citizen Action/Union of Concerned Scientists and Requesting Briefs on Appropriateness of Discretionary Intervention)*.

ARGUMENT

The NRC regulations, 10 C.F.R. §2.309(e), provide an opportunity for a petitioner to be admitted to a proceeding as a matter of discretionary intervention where, as here, there is at least one petitioner admitted with standing (Mr. Siemaszko), at least one admissible contention, and the petitioner has been denied standing as a matter of right under §2.309(d)(1). UCS/OCA have been denied standing as a matter of right, but have established sufficient grounds to be granted discretionary intervention in this proceeding pursuant to 10 C.F.R. §2.309(e), and Mr. Siemaszko urges, in fact pleads, for the Board to grant their request.

Mr. Siemaszko is a private party, with virtually no resources to challenge the action being taken against him. While represented by counsel in this matter, that representation is *pro bono* and being provided by a small firm with limited resources. The history of the Davis-Besse near miss event is the subject of one of the most rigorous and extensive evaluations that the NRC Staff has ever undertaken, including not only the investigation by the Office of Investigations (OI) that gave rise to this enforcement action,¹ but an extensive and exhaustive root cause

¹ The OI Report, No. 3-2002-006, dated August 22, 2003, has not yet been released.

evaluation by the Licensee,² enhanced oversight by the Staff through its Augmented Inspection Team,³ and a detailed investigation by the NRC's Office of Inspector General.⁴

Mr. David Lochbaum, the designated representative of UCS and OCA, has immersed himself in all the facts that have been developed in connection with these inspections and investigations. He likely has the most exhaustive knowledge of the Davis-Besse record, outside of the NRC Staff itself.⁵ It will be impossible for Mr. Siemaszko to duplicate that degree of knowledge and understanding of the facts outside of his own personal experience. In fact, Mr. Siemaszko had only worked at Davis-Besse for a little more than nine months when the events upon which the enforcement action is based actually occurred. That Mr. Lochbaum's involvement, as a party, will contribute to the development of a sound record on which the Board may base its decision is beyond dispute.

This role will be particularly useful in the face of the Staff's repeated attempts to keep its case confidential. If UCS/OCA are not admitted as parties, and any aspect of the hearing is confidential, Mr. Siemaszko will be unable to rely upon the extensive history in this matter

² Several versions of a Root Cause Analysis report were performed by the Licensee, and have been released to the Agency. All contain relevant facts to this matter.

³ See, the results of the Augmented Inspection Team inspection, documented in NRC Inspection Report No. 50-346/2002-03, issued May 3, 2002 and AIT Follow Up Special Inspection Report No. 50-346/2002-08.

⁴ See, the Report of the Office of Inspector General, *NRC's Regulation of Davis-Besse regarding Damage to the Reactor Vessel Head*, Case No. 02-03S, December 30, 2002.

⁵ Similarly, OCA has dutifully attended the numerous public meetings and forums conducted by the NRC Staff throughout the augmented inspection efforts, and cooperated with several investigations. The combination of this knowledge base will ensure a complete, fair and accurate record is developed.

already established by UCS/OCA and its analysis and assessment of information provided by the Staff in support of its efforts to blame the Davis-Besse near miss on Mr. Siemaszko.

In assessing the significance of these factors, it is important to reiterate the obvious. Mr. Siemaszko is a private individual. He is not being provided any defense by his former employer. He has been unemployed or underemployed, since September 2002. He has had to retain criminal counsel, move his family, and – as of today – recover from damage to his home and property by Hurricane Katrina. (Apparently, the storm has also rendered the current places of employment of both Mr. Siemaszko and his wife, uninhabitable for some time.) To say that significant forces appear allied against him would be an understatement at this point!

The factors set out for discretionary intervention in the controlling cases clearly argue for intervention in a situation where, as here, the addition of a petitioner who, like UCS/OCA has demonstrated a “significant ability to contribute on substantial issues of law and fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them.” *In the Matter Of Portland General Electric Company, et. al., (Pebble Springs Nuclear Plant, Units 1 & 2)*, CLI 76-27, 4 NRC 610, (December 23, 1976) Mr. Siemaszko believes that the addition of UCS/OCA would not only assist in the development of the record, but help “level the playing field” upon which this case is being heard, providing technical support and detailed record development to the case.

This is particularly evident in reviewing the factors that should have been considered by the Staff, and will be considered by the Board, in determining the appropriateness of taking

enforcement action against Mr. Siemaszko, an unlicensed individual.⁶ The Petitioners UCS/OCA's contribution to the development of the record -- in particular, item numbers eight and nine, i.e., the degree of management responsibility or culpability, and who identified the misconduct -- will be invaluable.

While discretionary intervention is most strongly supported by the assistance that UCS/OCA can bring to developing a sound record, the additional factors in support of discretionary intervention are also worth noting. The stated interests of Petitioners UCS/OCA -- that the public health and safety of their members in and around the vicinity of Davis-Besse are best protected by the fair adjudication of the facts in this case -- are consistent with factors weighing in favor of allowing intervention. Likewise, any order or decision in this case will impact the Petitioners' interest in protecting public health and safety.

A review of the factors weighing against intervention, also support a decision to permit it. The Petitioners will have no other means to protect their particular interest. 10 C.F.R.

⁶ Those factors, set out NUREG-1600, Section VIII, are:

1. The level of the individual in the organization;
2. The individual's training and experience as well as knowledge of the potential consequences of the wrongdoing;
3. The safety consequences of the misconduct;
4. The benefit to the wrongdoer, e.g., personal or corporate gain;
5. The degree of supervision of the individual, e.g., how closely the individual is monitored or audited, and the likelihood of detection;
6. The employer's response, e.g., the disciplinary action taken;
7. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility;
8. The degree of management responsibility or culpability; and
9. Who identified the misconduct.

§2.309(2)(I). That is, without being admitted as a party to this proceeding they will have no ability to present evidence or argument to the Board for consideration in its decision. Without intervention status they remain a bystander to these proceedings, and their valuable knowledge of the Davis-Besse situation will be outside the realm of the record. The particular interests of Petitioners UCS/OCA will not be represented by Mr. Siemaszko, since he is necessarily preoccupied trying to protect himself from wrongful and unfounded enforcement action by the Staff. The implications of this enforcement action to the public cannot be represented by Mr. Siemaszko. Those interests are supposed to be represented by the Staff, but here there is a credible argument being made that the Staff is not protecting the public in its enforcement actions against Mr. Siemaszko.

The Board should hear all of the facts, from all perspectives, in order to make a determination of whether the Staff's proposed enforcement action is supported by evidence that Mr. Siemaszko intentionally provided inaccurate and incomplete description of the work activities and corrective action taken relative to the presence of boric acid deposits on the RPV head, knowing that by doing so he would cause FENOC to be in violation of NRC regulations. 10 C.F.R. §2.309(2)(ii). Protecting the public health and safety is not served by an enforcement action that scapegoats one individual, creating a false impression that the actions of one person caused – or even could cause – such a significant near miss. It is the record as a whole that should form the basis of the Board's understanding of the facts and the foundation for its judgment.

Finally, the admission of the Petitioners on the narrowly identified contentions and issues will not, by design, broaden the proceeding or delay it. 10 C.F.R. §2.309(2)(iii). The issue is

already defined, albeit undergoing clarification, and will become the scope and bounds of the proceeding. The parties will be bound to that scope through the rigor of the proceeding and the application of the rules to the Parties.

FOR ALL OF THESE REASONS, Mr. Siemaszko urges the Board to exercise its discretion and accept the request of UCS/OCA to become Petitioners in this proceeding.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **REPLY OF ANDREW SIEMASZKO IN SUPPORT OF REQUEST BY UNION OF CONCERNED SCIENTISTS AND OHIO CITIZEN ACTION FOR DISCRETIONARY INTERVENTION** were served this 29th day of August, 2005, by the means indicated (electronic mail *; regular U.S. Mail **; facsimile ***), on the following:

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