

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Pre-Hearing Conference
ITMO Andrew Siemaszko

Docket Number: 05-839-02-EA

DOCKETED
USNRC

Location: (telephone conference)

September 1, 2005 (3:35pm)

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Date: Tuesday, August 30, 2005

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UNITED STATES OF AMERICA

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NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

(ASLB)

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TELECONFERENCE

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In the Matter of: ||

|| Docket No. 05-839-02-EA

ANDREW SIEMASZKO ||

Tuesday,

August 30, 2005

The above-entitled matter came on for
hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

LAWRENCE McDADE, Chairman

PETER S. LAM, Administrative Law Judge

ROY HAWKENS, Administrative Law Judge

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APPEARANCES:

On Behalf of Andrew Siemaszko:

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P-R-O-C-E-E-D-I-N-G-S

(2:08 p.m.)

CHAIRMAN McDADE: This is Lawrence McDade speaking. With me are Judge Hawkens and Judge Lam.

What I would ask, since the Court Reporter is not physically present but is on a telephone hookup, if you make a statement, if you could please identify yourself, so that we can be sure that the proper statement is attributed to the proper individual.

We are here in the matter of Andrew Siemaszko, ASLBP Number 05-839-02-EA. We're here for a--basically, a prehearing conference to hear oral argument on a motion that has been filed by the Staff to delay these proceedings. Specifically, they filed a motion to delay these proceedings through the end of November of 2005.

This is a second motion for a delay. We had previously granted a delay of 120 days and set a discovery schedule based on that. We have a couple of other motions pending as well. One is to maintain the status quo, which is asking that things sort of be held where they are at least until we rule on the motion.

The next thing that is going to happen is

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1 on September 19th. I am relatively confident that we
2 will be able to make a decision on this prior to
3 September 19th. However, it would be our
4 predisposition, if for some reason we are not able to
5 make a decision by that period of time, to have a
6 moderate stay, to put off the first initial discovery
7 until we have made a decision on a motion. But we're
8 really confident at this point in time that we should
9 be able to rule on the motion by September 19th.

10 The other matter that is currently pending
11 is the Staff had filed a motion that this hearing be
12 closed. And what I'm going to do is this. We're
13 going to start the hearing. At this point, the Union
14 of Concerned Scientists has not yet been admitted as
15 a party to this proceeding.

16 What I will do is to basically run through
17 things with them present. If there is anything that
18 the Staff has that they believe is inappropriate to be
19 said with the Union of Concerned Scientists present,
20 but they feel should be important for us to consider
21 in making our decision on their motion for stay, what
22 I would ask them to do is to simply jot it down.

23 At the end of the first phase of this
24 proceeding, the Union of Concerned Scientists would be
25 excused. And if there was anything that the Staff had

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1 that they believe at this point in time should be
2 limited to participants, parties, you know, they could
3 then state it at that point. That proceeding will be
4 transcribed.

5 And if the Union of Concerned Scientists
6 is ultimately admitted as a party to this proceeding,
7 at another point in time we will have a discussion as
8 to whether or not that transcript should be made
9 available to them. If they ultimately were admitted,
10 it would be our predisposition that they would then
11 have access to that transcript, but we would be
12 willing to hear from the Staff before it was turned
13 over in the event there was anything that they felt
14 was so confidential that it should not be turned over
15 to the Union of Concerned Scientists.

16 So I think that basically sets the ground
17 rules of what we propose to do, or an outline of the
18 schedule. Are there any objections to that from the
19 Staff?

20 MS. BROCK: This is Sarah Brock for the
21 Staff. Your Honor, that sounds acceptable to the
22 Staff. My only concern would be that the transcript
23 might only not be available to UCS, but not to the
24 general public at large, the second portion of the
25 transcript.

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1 CHAIRMAN McDADE: Well, what we could do,
2 I mean, a) let's see what happens with the transcript,
3 and what we could do is simply, you know, have what
4 you did already, which is a proposed protective order
5 and confidentiality agreement. And the transcript
6 would be turned over pursuant to that.

7 But let's wait and see what, if anything,
8 is in that transcript, and then decide what kinds of
9 protections, if any, are needed.

10 The second has to do with the current
11 affidavit of Mr. Ballantine, by the "current affidavit
12 of Mr. Ballantine" I mean the August 18th as opposed
13 to the May 17th affidavit. It was presented with a
14 proposed protective order and a confidentiality
15 agreement.

16 And one of the things that I wanted to
17 find out from Mr. Siemaszko's counsel: are you
18 agreeable to signing that confidentiality agreement at
19 this time, in order to gain access to the Ballantine
20 affidavit of August 18th?

21 MR. CLIFFORD: This is John Clifford
22 speaking. We are not agreeable to signing that
23 confidentiality agreement at this time, and we're
24 prepared to state our reasons if you wish.

25 CHAIRMAN McDADE: Please.

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1 MR. CLIFFORD: First of all, the
2 agreement, if you will, asks us to buy a pig in a
3 poke. We have no idea what is in this affidavit.
4 There's no description of it or why it needs to be
5 confidential. And it seems only fair to at least
6 describe the document and the contents of it and why
7 it needs to be confidential.

8 Secondly, in a conversation with Ms. Brock
9 last week, I asked her whether, if we were to sign
10 this agreement, Mr. Siemaszko would be permitted,
11 under the agreement, to share the affidavit with his
12 criminal attorney. And I was informed that he would
13 not be permitted to do so. This really would put him
14 in an intolerable situation.

15 If by chance there's some information in
16 there that might be helpful to him in defending
17 against being a target of a -- or a possible target of
18 a criminal investigation, if he -- if Siemaszko knows
19 it, and he can't share it with his attorney who is
20 charged with defending him, that doesn't make sense to
21 me, and it seems to be unnecessarily broad.

22 I think the third point I would make about
23 it is that the -- there's no -- if this affidavit --
24 if it turns out, and, of course, we haven't seen it,
25 but if the current Ballantine affidavit is essentially

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1 a rehash of the first Ballantine affidavit that was
2 openly filed and distributed to the parties without
3 any restriction, then it seems to me that essentially
4 the NRC Staff is attempting to close the barn door
5 after the horses are gone.

6 And, obviously, the Board is in a position
7 to make some evaluation on this point, whether it's
8 the same thing or not. But if it is essentially or
9 substantively the same thing, other than saying, you
10 know, a different estimate of time involved, then I
11 don't think it makes sense to attach confidentiality
12 to the document.

13 Thank you.

14 CHAIRMAN McDADE: Okay. This is Judge
15 McDade again. Let me share with you a little bit of
16 my thinking here and ask a question. Would Mr.
17 Siemaszko be willing to receive the affidavit under a
18 confidentiality agreement at this time? Once you have
19 read it, you would then be in a position to flesh out
20 the objections that you have just raised, and we could
21 take up whether or not that confidentiality agreement
22 would continue or not, whether or not there would be
23 a valid reason for it?

24 I understand your position. Right now
25 you've got something that's a pig in a poke. You have

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1 no idea what it is. You have outlined sort of general
2 reasons why you would be reluctant to enter into the
3 agreement. So my question is: what would your view
4 be on receiving it, pursuant to a confidentiality
5 agreement, understanding that once you have reviewed
6 it you could then file a motion to set aside the
7 confidentiality agreement?

8 MR. CLIFFORD: Well, I think that really
9 puts us in the same position that we're at risk of not
10 being able to share information that potentially is
11 relevant and even exculpatory with his criminal
12 attorney, and --

13 JUDGE HAWKENS: Mr. Clifford, excuse me.
14 This is Judge Hawkens. In my experience, it's not at
15 all unusual for a protective order in one proceeding
16 to limit it to the litigants in that particular
17 proceeding. This document is not intended to be used
18 for defense in a criminal matter, but it's intended to
19 be limited to this particular proceeding. And I'm not
20 sure why you want to base your objection on that
21 ground.

22 MR. CLIFFORD: Well, the reason I want to
23 -- I am raising the ground, and I probably have less
24 or at least less recent criminal defense experience
25 than anyone here -- matter of fact, no criminal

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1 defense experience, three-year old prosecutor
2 experience -- but the -- I understand that this order
3 would permit Mr. Siemaszko to see the affidavit.

4 But Mr. Siemaszko would be precluded from
5 sharing the information -- whatever information is in
6 it with his criminal attorney. It sounds -- seems to
7 me that that creates a really intolerable tension, or
8 potentially.

9 Now, saying all of this, I guess my gut
10 suspicion is that there's really nothing in this
11 affidavit, that it's just more of the same. But since
12 it has never been described to us in any way, I don't
13 know. And I am little -- we are cautious about what
14 we don't know.

15 CHAIRMAN McDADE: Okay. One other
16 possibility here, and see what you think of this, and
17 then I'll get -- as you about it -- would be that the
18 affidavit would go to civil counsel of Mr. Siemaszko,
19 not to Mr. Siemaszko. That you, as his counsel, would
20 have an opportunity to read it and to evaluate whether
21 or not there was anything in there that should remain
22 confidential and could then file a meaningful motion
23 to have it released at that point in time. Now,
24 either that it be -- you know, what the ultimate terms
25 would be.

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1 Is that something that you would dismiss,
2 or is that something that you would find agreeable?

3 MR. CLIFFORD: I'd find that less
4 disagreeable than the -- what had earlier been
5 described. And I do apologize. We really are --
6 we're kind of groping in the dark on this one, and not
7 really having much of an idea what the nature of this
8 affidavit is.

9 And as I say, if it's pretty much more of
10 the same with different estimations of conclusion
11 dates, as the first affidavit, then I'm a lot less
12 concerned about it than if there's something
13 substantive in there.

14 CHAIRMAN McDADE: This is Judge McDade
15 again. But, of course, you won't know that unless and
16 until you get to see it.

17 MR. CLIFFORD: Yes. Like that story "The
18 Lady or the Tiger" --

19 (Laughter.)

20 JUDGE LAM: This is Judge Lam. Mr.
21 Clifford, I fully share your concern about not
22 agreeing to this protective order. However, if you
23 don't sign it, you will not have access to it. So you
24 are caught. So wouldn't you be better off -- I mean,
25 right now you don't know what it ways. Wouldn't you

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1 be better off by signing the protective order?
2 Therefore, you -- at least you know what it is.

3 MS. GARDE: Judge, this is Billie Garde.
4 This particular proposed protective order is pretty
5 onerous and contains all kinds of, you know, threats
6 and prescriptions to make sure that whoever signs it
7 doesn't release it. And as a practical matter, we
8 don't want to back into a situation where we -- you
9 know, we have a little nibble here and a little nibble
10 there, and all of a sudden we're in a closed
11 proceeding, which we don't want to end up in.

12 We feel like the charges were public, and
13 the case needs to be conducted in public. And we need
14 to be very careful in the context of any step down a
15 path toward a sealed proceeding.

16 It does seem that the easiest thing to do
17 would be to say, "Okay. Let me just quick take a look
18 at it to see if there's a problem." But I think that
19 signing this order, and then having to try to argue to
20 get out from under it, establishes a situation where
21 it would be just far too easy to start stamping
22 everything in this proceeding "Confidential."

23 JUDGE LAM: This is Judge Lam. I
24 understand. Thanks.

25 CHAIRMAN McDADE: Okay. This is Judge

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1 McDade again. I don't think I need to hear from the
2 Staff on this. I think at this point in time the way
3 we would proceed is as follows. We are not going to
4 turn over the affidavit at this point. We would urge
5 the representatives of Mr. Siemaszko to draft a
6 protective order that would be acceptable to them.

7 If you could do that before you leave for
8 your trip to Ireland, get it to the Staff, and by the
9 time you get back the Staff would have had an
10 opportunity to review it, and you could then have
11 discussions to see whether or not you can reach an
12 agreement on a protective order, and by that time
13 perhaps the need for the protective order will no
14 longer exist, and we will simply take this up again
15 after you all get back from Ireland.

16 MS. GARDE: Fair enough. We'll do that.

17 CHAIRMAN McDADE: Okay. Now, the next
18 thing I would like to move forward with and ask some
19 questions of the Staff -- and, again, if there are
20 answers to this that you believe are inappropriate
21 with a non-party present, just make a note to
22 yourself, jot it down, and I'll get you a chance --
23 give you a chance to augment it later, and then we
24 will take up whether or not the transcript of that
25 should ultimately be turned over to the Union of

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1 Concerned Scientists, if at a later point in time they
2 are admitted as a party.

3 Specifically, my questions are this. In
4 the order that we issued, the previous order in this
5 matter back on July 22nd, we addressed the possibility
6 that there might be another motion for a stay, as the
7 Staff in their pleadings had indicated that that was
8 a possibility.

9 We specifically cited some of the case law
10 that has developed over the years on how a court
11 should exercise its discretion in these matters, what
12 they should balance in performing this balancing test.

13 And, specifically, in considering whether or not
14 the disclosure of information could jeopardize an
15 ongoing criminal proceeding, we were supposed to
16 consider the potential for witness intimidation,
17 perjury, or the manufacture of evidence by a
18 defendant. And we cited various cases that held to
19 that proposition.

20 In your most recent pleading, you cited to
21 a Federal Register notice that had been put out by the
22 Federal -- by the Nuclear Regulatory Commission that
23 basically seemed to track that case law, that
24 maintaining confidentiality may be necessary to
25 prevent the altering of evidence, limit the direction

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1 or nature or availability of further statements of
2 evidence to protect confidential sources to limit the
3 possibility of harassment or witness intimidation. I
4 mean, those are the factors that we are supposed to
5 consider in doing this balancing test.

6 In my reading of your pleadings, what is
7 presented to us so far, there is no discussion of any
8 of that. As you look it, standing back from it, Mr.
9 Siemaszko is no longer employed by the company, he no
10 longer lives in the community. He was not a senior
11 executive to whom people had long-time reporting
12 requirements. He had only worked there for a
13 relatively few months, I believe less than a year at
14 the time of the incident.

15 So taking those factors, the ones that we
16 cited in the order of July 22nd, and the ones that the
17 Nuclear Regulatory Commission cited in their Federal
18 Register notice, is the staff able to explain to us
19 whether any of those factors are present in this case,
20 and the basis for believing it to be so?

21 MS. BROCK: Well, Your Honor, this is
22 Sarah Brock for the NRC Staff. I think we can. We
23 have a bit of a difficulty. We were prepared -- after
24 receiving your order of July -- of August 24th, I went
25 back to the Department of Justice and was given some

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1 more information.

2 But without Mr. Siemaszko signing the
3 protective order, I am -- I am trying to say these
4 things in a way that won't impact the criminal
5 proceeding at all. That is somewhat difficult -- to
6 be very specific.

7 I guess one thing that I would note,
8 though, is when this case goes into discovery, or as
9 soon as we disclose documents, we're not just
10 disclosing them to Mr. Siemaszko. We are disclosing
11 them to the public at large, and that is a major
12 concern. It has a major impact on the -- on the
13 Government's investigation. I mean, specifically,
14 that would include the disclosure to First Energy.

15 And in looking at the Federal Register
16 notice that we cited -- and I would argue that it's
17 really Commission policy to stay a proceeding when
18 there's a criminal investigation going on. And that's
19 - and those aren't immediately effective orders, and
20 this is not an immediately effective order.

21 And so the -- I mean, as we have
22 previously discussed and has been well established,
23 Mr. Siemaszko was not employed at the time that we
24 issued this order. Nothing about his legal status has
25 changed. So it's difficult for us to perceive any

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1 harm from staying the proceeding, in light of the
2 overwhelming interest in allowing the criminal
3 proceeding to go on.

4 I think there are scores and scores of
5 cases that routinely put off a civil proceeding in a
6 light of a criminal proceeding. And I think part of
7 that is because the criminal standards are different.
8 A criminal defendant should not be allowed to take
9 advantage of civil discovery standards.

10 I think something that Mr. Clifford
11 alluded to in saying why he wouldn't sign the
12 protective order argues in favor of the Staff motion
13 to stay the proceeding, in that he said that he didn't
14 want to sign it if it couldn't be shared with his
15 criminal attorney.

16 This proceeding -- it is inappropriate,
17 and there are scores of cases to support that it's
18 inappropriate for them to use this proceeding to
19 promote his criminal defense. And for them to gain
20 access to discovery materials that they would not have
21 in the criminal proceeding is unfair to the
22 Government. There is a different standard of proof in
23 a criminal proceeding. There is a different standard
24 of evidence.

25 And I think -- I mean, Ms. Garde's

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1 statement that she wants to try it all in the public,
2 that's perfectly acceptable to the NRC Staff, and also
3 weighs in favor of staying the entire proceeding,
4 because in fact, I mean, to the extent we move forward
5 it will be more and more restricted as the Government
6 is more concerned about what goes out into the general
7 public. Whereas, if we wait until the criminal
8 proceeding is over, then there is no confidentiality
9 issues.

10 CHAIRMAN McDADE: This is Judge McDade
11 again. A couple of things that arise based on what
12 you've said. The cases you cite, which are many, many
13 cases, without citing any specific case, that
14 basically follows that the -- the case that you filed
15 as well -- in the order that we issued we did cite a
16 number of cases and addressed -- those cases addressed
17 the reasons why a proceeding would be delayed.

18 There are many cases out there that say
19 that a defendant cannot use civil discovery to gain
20 advantage in a criminal proceeding. But those are
21 generally cases where the criminal defendant initiates
22 the civil proceeding and basically uses it as a
23 stalking dog for the criminal case.

24 And they say that he can't make up a civil
25 proceeding just simply to gain discovery that he

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1 wouldn't otherwise get in a criminal case. Here Mr.
2 Siemaszko hasn't decided to initiate the civil
3 proceedings. The United States Government decided to
4 initiate the civil proceedings, and the case law then
5 says we're supposed to do a balancing test of his
6 interest in a prompt resolution of the matter, and the
7 Government's interest in wistfully pursuing criminal
8 sanctions where appropriate.

9 And the case law then discusses various
10 factors that we are supposed to consider as to the
11 manufacture of evidence by a defendant. And looking
12 at it from the outside, and not being privy --

13 THE COURT REPORTER: Excuse me, Your
14 Honor. This is the Court Reporter. Your voice is
15 clicking in and out, and the significance of what
16 you're saying is becoming lost in the transcript.

17 CHAIRMAN McDADE: For what period of time
18 has this been clicking in and out?

19 THE COURT REPORTER: It's been about 20
20 seconds. When you said -- the first word that - when
21 you said "prompt resolution of the matter" was the
22 first time that the -- it came up, and that is now 45
23 seconds ago.

24 CHAIRMAN McDADE: The case law -- we are
25 supposed to do a balancing test here. On one side of

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1 the balance is Mr. Siemaszko's clear interest in the
2 prompt resolution of these proceedings. At the other
3 side of the balance is the Government's interest in
4 being able to enforce the criminal laws. And the case
5 law basically describes what factors we are supposed
6 to take into consideration.

7 And what I'm offering the staff is the
8 opportunity to address any of those factors, and you
9 can either do it now, or, if you believe there is some
10 need for confidentiality on that, after Union of
11 Concerned Scientists goes off the line.

12 But one other thing that arises from that
13 is in this particular instance you have asked for a
14 continuance through the end of November. And the
15 question is: what in the Staff's view changes if this
16 matter shifts from an investigatory to a prosecutory
17 stage? From my standpoint, stepping back from this,
18 I can't conceive of how turning this information over
19 to Mr. Siemaszko would interfere with the
20 investigation.

21 This is conduct that occurred more than
22 four years ago. It was a matter that was turned over
23 by the NRC to the Department of Justice more than two
24 years ago, and the Department of Justice has been
25 actively investigating it for more than two years.

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1 If Mr. Siemaszko is to receive information
2 right now, it doesn't seem that there is anything that
3 he could do to interfere with the investigation at
4 this late stage. However, once you get into the
5 prosecutorial stage, the question is: what happens
6 then? And one of the things I noted in the order that
7 we issued is that, at least through November, the only
8 discovery that happens is the mandatory discovery
9 under Section 2.336(b).

10 After November, if we were to proceed,
11 there is much other discovery, including the
12 possibility for interrogatories, depositions, and, if
13 anything, that would interfere more with a criminal
14 prosecution than anything that in the mandatory
15 discovery could possibly interfere with the ongoing
16 investigation.

17 So from the Staff's standpoint, is the
18 request 'til November just simply another step? And
19 then, what happens in November? If an indictment is
20 returned, will you be asking us to stay this
21 proceeding until all of the criminal proceedings are
22 over? Which could be years.

23 And particularly, as you pointed out, it's
24 not just sharing it with Mr. Siemaszko. It's sharing
25 it with -- you mentioned First Energy. But assuming

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1 there are other targets, you know, we may well have a
2 situation come the first of the year where there are
3 scores of other individuals who were charged
4 criminally but not Mr. Siemaszko.

5 Now, what do we do with this proceeding?
6 Do we prevent depositions in this proceeding, because
7 that information might go to other criminal
8 defendants?

9 Anyway, does the Staff wish to comment?
10 I realize there are a lot of questions there.

11 MS. BROCK: Yes. Your Honor, I will try
12 to answer them, and let me know if I don't answer
13 anything that you're looking for, if I have missed
14 any.

15 I think, according to our discovery
16 schedule, we would be required to serve our answers to
17 interrogatories before this requested stay would
18 expire. And that is something, obviously, that the
19 Department of Justice is very concerned about the
20 agency doing. We would also be required to ask
21 interrogatories, which could start to disclose some of
22 where we were going with the case.

23 There are concerns about the release of
24 the mandatory disclosures. I think -- now, in terms
25 of your specific questions about possibility of

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1 perjury, manufactured evidence, and witness
2 intimidation -- actually, let me consult with the
3 Staff for just one moment. Is that okay?

4 (Pause.)

5 In terms of witness intimidation, the
6 Office of Enforcement has informed me that they have
7 received an allegation of witness intimidation from
8 the Grand Jury, an allegation essentially of
9 retaliation on the part of the company for a witness
10 who had testified in this matter before the Grand
11 Jury.

12 The concern is that if we release all of
13 those transcripts and all of the documents surrounding
14 it, that that starts to give out a lot more
15 information about who has given information, obviously
16 not to the Grand Jury, because that's not part of our
17 case, but previously to OI a lot of those issues
18 necessarily overlap.

19 CHAIRMAN McDADE: Okay. But that has
20 nothing to do with Mr. Siemaszko. Would there be any
21 objection from the Government if the Section 2.336(b)
22 discovery were turned over to Mr. Siemaszko in
23 September, pursuant to a protective order that would
24 allow he and his counsel, and I would not limit it to
25 civil counsel, but he and his counsel to have that

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1 information, but that they would not be allowed to
2 share it with First Energy or any other First Energy
3 employees.

4 MS. BROCK: Well --

5 CHAIRMAN McDADE: Would that solve your
6 problem?

7 MS. BROCK: No, it would not, Your Honor.

8 CHAIRMAN McDADE: Why not?

9 MS. BROCK: That is not something that I
10 can answer, unfortunately. I'm sorry. I'm kind of
11 caught in a difficult situation here. I can't answer
12 that question in a non-closed proceeding.

13 CHAIRMAN McDADE: Jot it down. We'll come
14 back to it.

15 MS. BROCK: In terms of the Commission
16 policy, though -- and I'm looking now -- when the
17 Commission promulgated its rules on staying
18 proceedings, it specifically noted that a reason to
19 stay a proceeding was the pendency of a criminal
20 investigation. And this has always been the
21 Commission's policy.

22 If you look at our Memorandum of
23 Understanding with Department of Justice, it reflects
24 that we will seek stays of civil proceedings. And
25 with all due respect, I think that the agency can --

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1 I think the Staff position can prevail under the cases
2 that you cite in terms of a balancing test. But I
3 don't think pursuant to Commission policy that you
4 even need to reach those, because --

5 JUDGE HAWKENS: Excuse me. This is Judge
6 Hawkens. Can you address how you would anticipate
7 things would change at the end of November if this
8 goes into a prosecutorial stage?

9 MS. BROCK: Yes. Obviously, that's
10 somewhat speculative. It would depend on what, if
11 any, indictments were returned. But if an indictment
12 is returned against Mr. Siemaszko specifically, the
13 Staff does anticipate seeking another stay.

14 JUDGE LAM: This is Judge Lam. Ms. Brock?

15 MS. BROCK: Yes.

16 JUDGE LAM: If that happens, when you seek
17 another stay, are you thinking about moving to stay
18 this proceeding until the criminal proceeding is over?

19 MS. BROCK: Well, Judge Lam, I am -- I am
20 thinking about staying the proceeding I guess until
21 the criminal proceeding is over, unless the Department
22 of Justice informs me that that's not necessary. We
23 would only seek to stay at their request.

24 So if they were to determine that a stay
25 was -- and that has certainly happened in previous

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1 cases, that a stay was no longer needed. we would
2 move ahead -- or that the criminal proceeding had
3 reached such a stage that there was no need for a
4 stay, we would certainly not attempt to stay this
5 proceeding any further.

6 But when I spoke with them on this
7 specific question, they said if there was an
8 indictment returned against Andrew Siemaszko, at this
9 point they did anticipate asking for another stay for
10 that proceeding.

11 CHAIRMAN McDADE: This is Judge McDade.
12 What if there's an indictment returned against others
13 but not Mr. Siemaszko?

14 MS. BROCK: At this point, that is
15 speculative enough that we're not able to answer it
16 with any sense of certainty. I think it would depend
17 on a lot of different factors that are probably
18 unlikely to occur.

19 CHAIRMAN McDADE: Okay. Specifically,
20 what were you referring to by way of a Commission
21 statement -- or to criminal proceedings? Can you
22 point that out that to me?

23 MS. BROCK: Yes. If you look at the -- if
24 you look at the rulemaking of 10 CFR -- let me find
25 the right spot -- about delaying an immediately

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1 effective order, actually -- this is in the Federal
2 Register notice, Volume 57, May 12, 1992, at 20197.

3 CHAIRMAN McDADE: I'm sorry. Can you
4 repeat that?

5 MS. BROCK: Sure.

6 CHAIRMAN McDADE: Volume 57.

7 MS. BROCK: It's 57 Federal Register
8 20197. And it's discussing comments on whether or not
9 a proceeding should be delayed. And it says, "It is
10 contemplated that, under the rules, the presiding
11 officer will grant a delay only if there is an
12 overriding public interest for the delay." A prime
13 example would be the temporary need to halt a
14 proceeding where continuation would interfere with
15 pending criminal investigations or jeopardize
16 prosecution.

17 CHAIRMAN McDADE: And the question that I
18 think I've been asking, and perhaps inarticulately,
19 for the last half hour is: how do you envision Mr.
20 Siemaszko would adversely -- and do a balancing
21 test --

22 THE COURT REPORTER: Your Honor, your
23 voice is clicking out again. I'm having trouble
24 carrying you.

25 CHAIRMAN McDADE: What I am asking is if

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1 you could explain to us how, in the Government's view,
2 turning over this material to Mr. Siemaszko would
3 adversely impact the Government's interest. In the
4 previous orders that we have issued, we have
5 recognized that Mr. Siemaszko has a legitimate
6 interest in a prompt resolution of this matter, that
7 he is now unemployable and will remain unemployable
8 until these matters are resolved.

9 So he has an interest in a prompt
10 resolution. That interest is -- not necessarily
11 overrides everything else. We're supposed to do a
12 balancing test. The balancing we're supposed to do
13 is: how would our proceeding interfere with the
14 criminal proceeding?

15 And that's what I've been asking is for
16 any specifics as to how you all anticipate our moving
17 forward would interfere with the criminal proceeding.
18 And, you know, as opposed to just saying it would, is
19 there anything that you can point to to indicate how
20 it would? And why -- and then, from that, to argue
21 why that overrides Mr. Siemaszko's interest in a
22 prompt resolution of this?

23 MS. BROCK: Well, the standards of proof
24 in the criminal proceeding and in the civil proceeding
25 are very different. The Government has a different

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1 burden in a criminal proceeding. And they think that
2 having these -- right now, they are only -- in this
3 proceeding, they have allowed witnesses to see their
4 own statements but not the statements of other
5 witnesses.

6 That's not something they're entitled to.
7 They're not entitled to the theories behind -- the
8 theory of the case that the investigators have written
9 up. And allowing them access to all that information
10 starts to change the burden. It starts to change the
11 framework that the Government is operating under.

12 I also think I'm going to -- the balancing
13 test that you're applying here is the presiding
14 officer may delay the hearing for good cause,
15 consistent with -- and this is 10 CFR 2202(c)(2),
16 talking about immediately effective orders and the
17 context in which this normally comes up.

18 It says the presiding officer may delay
19 the hearing on an immediately effective order at any
20 time where good causes exists when such periods are
21 consistent with the due process rights. Well, in this
22 instant case, I would argue -- and I know that we have
23 argued this before -- that Mr. Siemaszko's due rights
24 have not been affected.

25 It was not an immediately effective order.

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1 He has had no legal change in his status, and so that
2 makes the balancing test really quite easy. I agree
3 that he has, as any civil litigant does, an interest
4 in a prompt resolution of the proceedings, but not --
5 it doesn't come anywhere close to overriding the
6 Government's interest in a criminal investigative
7 process.

8 And I would go to Campbell v. Eastland,
9 which is the Fifth Circuit leading case, 1962,
10 administrative policy gives priority to the public
11 interest in enforcement.

12 And I -- in this instant case, prior to
13 the conclusion of the Department of Justice's
14 investigation, the Staff will be required under our
15 current schedule to both turn over our initial
16 documents, which to put some categorization on that
17 the OI report itself has over -- I think it's 274
18 exhibits. OI has some 70,000 pages of material in
19 response to this case.

20 Now, a lot of that is not necessarily
21 relevant to the specific issues surrounding Mr.
22 Siemaszko, but that's an enormous amount of material
23 that currently has not been publicly disclosed, is
24 used for the criminal case, and that the Department of
25 Justice believes would jeopardize their criminal

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1 investigation.

2 Now, I'm not privy to the details of their
3 criminal investigation, so it's difficult for me to
4 explain -- and in explaining the ways it interferes,
5 it starts to give away parts of it, which I'm trying
6 very hard not to do.

7 JUDGE HAWKENS: But you are prepared to
8 tell us that off the record later?

9 MS. BROCK: Well, I can give you a little
10 bit more information. But the problem I'm having
11 right now is that information was given to me,
12 supplementing the affidavit, premised on the fact that
13 Mr. Siemaszko would then be under the protective
14 order, which at this point he is unwilling to sign.
15 So what I might need to do on that -- and if you want
16 me to, I will -- I'll ask them to put it in another
17 affidavit to be submitted under seal.

18 CHAIRMAN McDADE: Not submitted under seal
19 but submitted in camera?

20 MS. BROCK: Yes. Yes, submitted in
21 camera.

22 CHAIRMAN McDADE: Okay. Let me ask one
23 other question here. This is Judge McDade again. If
24 we were to modify our discovery order, and state that
25 the discovery due currently on the 19th of September,

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1 the 2.336(b) discovery, would be provided to the
2 parties, but whether or not they agreed or not, we
3 would issue a protective order that would say that it
4 would be turned over to them with the caveat that they
5 could not share it with anybody else without receiving
6 a further order from this Board to do so, then it
7 would be turned over to Mr. Siemaszko and his attorney
8 -- not specifying criminal or civil, over to Mr.
9 Siemaszko and his attorneys, and they would be allowed
10 to use it in preparing his defense -- you know, again
11 broadly -- but they would not be able to share the
12 contents of that information with anybody without
13 getting a further order from the Board. And the same
14 would be where Union of Concerned Scientists, if they
15 had been admitted as a party at that point in time.

16 If that were the environment in which you
17 were working, could you explain any potential harm to
18 the ongoing criminal investigation that could occur
19 under those circumstances?

20 MS. BROCK: Yes. I think what we could
21 explain currently on the record is that would be
22 interfering with the Government's burden of proof. In
23 giving it to Mr. Siemaszko, especially -- is that
24 premised, then -- I'm assuming that that would move
25 the rest of the discovery schedule up, so that we

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1 wouldn't be answering interrogatories?

2 CHAIRMAN McDADE: Well, my recollection is
3 not that you would be answering interrogatories, but
4 that you would be submitting it over, not that those
5 answers to them would be due in October. I am
6 correct? The answers are due November 23rd?

7 MS. BROCK: Right. Which is prior to the
8 end of the requested stay.

9 CHAIRMAN McDADE: By a week, which
10 includes the Thanksgiving holiday.

11 MS. BROCK: Right. I understand that it's
12 close. But especially if we're, then, looking at
13 seeking another stay if there's an indictment returned
14 -- well, and I guess it doesn't matter. I mean, once
15 there's -- once the documents are gone, they're gone.
16 I think we can still articulate harm to the criminal
17 proceeding.

18 I think specifically that if it's turned
19 over to even just Mr. Siemaszko and his counsel, since
20 he is -- since he has stated that he is a target of
21 the investigation, he is then gaining a benefit from
22 having this civil proceeding to be used in a criminal
23 case. And that goes against the long-established
24 policy of giving deference to the criminal proceeding
25 and allowing the criminal proceeding to go forward.

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1 CHAIRMAN McDADE: But Mr. Siemaszko didn't
2 institute the proceeding. I'm sure he would just as
3 soon that this proceeding disappear.

4 MS. BROCK: Well --

5 CHAIRMAN McDADE: How does this mean that
6 he is using it inappropriately? He is trying to
7 defend himself from charges made by the U.S.
8 Government, both civil and criminal.

9 MS. BROCK: There are two ways to look at
10 that. I mean, the Staff instituted it in the sense
11 that we issued the order. But he wasn't currently
12 employed in the industry, and he asked for a hearing
13 on it. I mean, there's different people who this has
14 happened to who have approached it different ways.

15 The company has asked for an extension of
16 time due to the criminal proceeding which they were
17 granted. He asked for a hearing within 24 hours of
18 the order being issued. So we did institute this, but
19 that was pursuant to the Commission's policy of -- I
20 mean, that's part of the NRC's obligation to protect
21 the public health and safety.

22 CHAIRMAN McDADE: I'm not really sure what
23 you just said. I think you said that with regard to
24 the imposition of a civil sanction the company asked
25 for a delay in their ability to request a hearing. Is

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1 that correct?

2 MS. BROCK: Yes, that's correct. That's
3 a matter of public record.

4 CHAIRMAN McDADE: And in that case, the
5 company was being asked to pay an amount of money.

6 MS. BROCK: Right.

7 CHAIRMAN McDADE: So given the fact that
8 if, from a company standpoint, the delay works in
9 their favor, in that the only thing that's being
10 postponed is they pay the money later as opposed to
11 sooner, so from a company standpoint a delay in the
12 civil proceeding avers to their benefit, whereas, with
13 regard to Mr. Siemaszko, a delay in this
14 administrative proceeding avers to his detriment.
15 Isn't that correct?

16 MS. BROCK: I see your point, Your Honor.
17 I would still maintain -- the Staff would still
18 maintain that this order was not immediately
19 effective. And that if he wished to go and get a job
20 currently in the nuclear industry, if he could, that
21 the order did not change his legal status. So I'm not
22 -- I don't -- I agree that there is a difference,
23 where the company doesn't have to pay now and he's --
24 but where I would disagree with you is that I do not
25 believe that he is harmed.

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1 CHAIRMAN McDADE: But from Mr. Siemaszko's
2 standpoint, the possibility -- hypothetical that I
3 raised with the Staff that the discovery on the 19th
4 of September under 2.336(b), that that be furnished to
5 you under a protective order, the protective order
6 would allow it to be shared with Mr. Siemaszko and all
7 of Mr. Siemaszko's counsel. But you would not be able
8 to disseminate the documents outside the defense team
9 without a further order. What is your view of that?

10 MS. GARDE: Well, Your Honor, I think the
11 sooner I can get started on reading 274 exhibits and
12 70,000 pieces of paper, the better. And so I agree
13 with your premise that receiving that information for
14 the purposes of starting to review it by Mr. Siemaszko
15 and his counsel works to advance the ball in the right
16 direction.

17 Where I think it turns afoul of not
18 solving the fundamental or, actually, the penultimate
19 question you posed to the Staff, is as soon as we
20 start asking questions or being expected to do
21 anything with that material other than read it,
22 investigate it, ask interrogatories, plan for
23 depositions, show information to others, we were
24 stymied.

25 So we get the time to start reading, and

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1 that's great, and I don't have a problem with that as
2 you've described it. It's just that we do have to
3 look at, you know, where that ends.

4 CHAIRMAN McDADE: Well, here is my thought
5 -- and this is Judge McDade again -- of where it ends.
6 If you've got the materials, and one cord that the
7 Staff said that did at least chime with me, is if Mr.
8 Siemaszko was able to give this information out to
9 anybody, although those factors such as, you know, the
10 possible altering of evidence, intimidation of
11 witnesses, etcetera, that we discussed in some detail
12 before, at least I discussed in some detail before,
13 there is no indication that he would either have the
14 ability or the desire to do any of that. There may
15 well be other people who would. And that, therefore,
16 the unrestricted release of the information might have
17 some potential to adversely affect the ongoing
18 investigation.

19 If it were submitted to you, pursuant to
20 a protective order, you would be able to read the
21 materials, use that to draft your interrogatories,
22 which are due sometime in October, the responses
23 aren't due until the end of November, and it wouldn't
24 be until after that that you would be getting the
25 depositions. So that that would occur after the

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1 period of time that the Staff is seeking protection
2 for.

3 So, again, you know, I'm trying to, you
4 know, think of a balancing test. How do I protect Mr.
5 Siemaszko's rights and at the same time not interfere
6 with the ongoing criminal investigation? What I just
7 suggested is a possibility. I don't know whether my
8 colleagues will agree or disagree. I just wanted to
9 fully understand what your views are with regard to
10 it.

11 Is that something that you would object
12 to?

13 MS. GARDE: Well, if we have -- if we do
14 our interrogatories, I can envision a situation where
15 those interrogatories, to be true to your intent,
16 would have to be filed under seal. So as a practical
17 matter, I think your proposed balance is a good one,
18 and I think there is a tremendous amount of work that
19 needs to be that I'd rather get started on sooner than
20 later, and recognize that the misuse of that
21 information, you know, could -- I recognize the same
22 thing you're saying about the Staff, and a potential
23 allegation of retaliation by FENOC.

24 So I think we could live with that. I
25 think we'd have to see what it all looks like. Again,

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1 as I said in the beginning, I want to make sure that
2 we don't creep toward a sealed hearing, but I do
3 understand this kind of more limited action that you
4 are proposing. And John and I both think that that's
5 -- that's probably workable.

6 CHAIRMAN McDADE: Okay. Mr. Lockbaum,
7 sorry for ignoring you so long here. Question:
8 assume for the sake of argument that Union of
9 Concerned Scientists will be admitted as a party as of
10 September 19th. What would be their view as to
11 receiving this documentation, the 2.336 discovery,
12 pursuant to a protective order?

13 MR. LOCKBAUM: This is Dave Lockbaum.
14 I've talked to Ohio Citizen Action and UCS, and we
15 would be -- it would be difficult for us to
16 participate or to agree to a protective order. And as
17 this preconference hearing showed, it would be
18 complicated for us to be involved without signing it.
19 So our inclination would be to withdraw from the
20 proceeding rather than -- we really don't want to
21 complicate things any more than they're already
22 complicated.

23 So if that was the only way to -- if
24 signing a protective order was the only way we could
25 participate, we would opt not to participate.

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1 MS. GARDE: This is Billie Garde. For
2 that reason, because both UCS and Ohio Citizen, as,
3 you know, nonprofit organizations with a, you know,
4 legal obligation to inform the public about what, you
5 know, they are doing, and what they are finding, we've
6 got to be careful we don't creep to exactly that
7 outcome.

8 CHAIRMAN McDADE: Okay. Let me pose
9 another hypothetical here, and start with Mr.
10 Lockbaum, then Mr. Siemaszko, then the Staff on that.
11 It would be to make the documents available
12 September 19th to Mr. Siemaszko pursuant to a
13 protective order, have that protective order run
14 through the end of November, the period of time that
15 the Staff is seeking protection for.

16 At the end of November, the protective
17 order would lift, and at that point in time the
18 documents could be made available to Union of
19 Concerned Scientists.

20 Mr. Lockbaum, what would your view be of
21 that?

22 MR. LOCKBAUM: This is Dave Lockbaum. We
23 would welcome that scenario, with the added
24 understanding that if there are any Board discussions
25 with the parties between the first deadline and the

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1 second deadline, that we would not be involved in
2 those. We really don't want to complicate this
3 process any more than is necessary.

4 And then, we would pick up once the
5 documents were available, and then we would
6 participate in the conference calls and things like
7 that. So with that understanding, that would work for
8 us.

9 CHAIRMAN McDADE: What is Mr. Siemaszko's
10 view on that?

11 MS. GARDE: Well, I would like to have Mr.
12 Lockbaum's assistance as soon as is practical, but I
13 completely understand and respect his organization's
14 position on receiving documents in secret. And to
15 that extent, I would obviously defer to him honoring
16 those interest organization issues. And I wouldn't
17 have a problem with it.

18 CHAIRMAN McDADE: What is the Staff's
19 position?

20 MS. BROCK: The Staff, well, fundamentally
21 still has some -- still has concerns, which we may be
22 submitting under seal about revealing any of the
23 documents to Mr. Siemaszko. However, the -- putting
24 those aside, we would be concerned about anything that
25 then had an automatic lift of the protective order at

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1 the end of November, since we don't know where we will
2 be then. So I'd hesitate to agree to something that
3 could have an unintended consequence.

4 CHAIRMAN McDADE: So you wouldn't
5 necessarily have to agree to it. We could --

6 MS. BROCK: Well, right. I -- I
7 understand that. I guess I would hesitate to not
8 oppose anything that might have an unintended
9 consequence.

10 CHAIRMAN McDADE: Okay. And one
11 possibility would be that we would have another
12 hearing, prehearing conference, after Thanksgiving at
13 which point we would make final decision on what to do
14 with those documents.

15 JUDGE LAM: This is Judge Lam. Ms. Brock,
16 I would like to hear your view on this scenario Judge
17 McDade just raised. What happens on October 30th
18 where the protective order is lifted and then you
19 decide to come in to ask for a stay? How would that
20 complicate things for you?

21 MS. BROCK: Well, Judge Lam, that's my
22 hesitation on agreeing to the protective order. I
23 think that the calculus of this proceeding
24 substantially changes in the event that Mr. Siemaszko
25 is indicted. I think that that changes a lot of

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1 things. It may change things for him. It may change
2 things -- certainly, it starts to change some of the
3 discovery questions, and it's a lot easier to figure
4 out where to proceed.

5 Now, in the event that he is not indicted,
6 then there is no issue. If there's no indictment
7 returned, we can easily go forward and give out the
8 documents to whoever wants them.

9 CHAIRMAN McDADE: Again, here is one of my
10 issues. You just said, "If he's not indicted, we
11 could turn over the documents." Assume that's the
12 case -- and I'm sure Mr. Siemaszko dearly hopes that
13 assumption comes true -- but other individuals are
14 indicted. Mr. Siemaszko now has access to all of this
15 information. He can turn it over -- he can take out
16 an ad in The New York Times and put all the
17 information there in an envelope.

18 Now, First Energy says, "I'll help you out
19 if you give me my" --

20 THE COURT REPORTER: Your Honor, this is
21 the Court Reporter. Your voice is beginning to drop
22 out again.

23 CHAIRMAN McDADE: Okay. What happens if
24 Mr. Siemaszko isn't indicted but others are? Are you
25 going to be asking for a stay?

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1 MS. BROCK: Your Honor, I'm sorry, I'm not
2 trying to be non-responsive. I honestly don't know.
3 I think that it's somewhat speculative. I do think if
4 Mr. Siemaszko is not indicted, and others are, that it
5 will be very easy for us to proceed with some sort of
6 protective order. I mean, then I don't think we would
7 have any hesitation about turning over the documents
8 to him. And I haven't discussed that particular
9 scenario with the Department of Justice.

10 But I don't think we would have -- if he
11 is not indicted, I don't think we would have any
12 questions about turning over the documents pursuant to
13 some sort of protective order and moving forward.

14 JUDGE HAWKENS: This is Judge Hawkens. I
15 would want a definitive statement to that effect,
16 whatever document I suppose you're going to be
17 providing to us in camera. So --

18 MS. BROCK: Yes. If he is not -- okay.
19 Let me just be clear on what you're asking is about
20 whether we would be able to proceed if he is not
21 indicted?

22 JUDGE HAWKENS: Correct.

23 MS. BROCK: Okay. I can ask him that
24 question.

25 JUDGE HAWKENS: Based on your discussion

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1 with the AUSA.

2 MS. BROCK: Yes.

3 JUDGE HAWKENS: DOJ attorney.

4 MS. BROCK: Yes.

5 CHAIRMAN McDADE: Okay. Is there anything
6 else that the Staff feels that they can share with us
7 at this point, with Union of Concerned Scientists
8 still on the line? And is there anything, if they
9 ring off, that you would want to share with us before
10 we terminate this prehearing conference?

11 MS. BROCK: No. Your Honor, without the
12 signing of the protective order, I think it's best if
13 we submit that in camera.

14 CHAIRMAN McDADE: So the Staff has nothing
15 further for --

16 MS. BROCK: And I guess just to be
17 perfectly clear on that, we went through Commission
18 policy and we were trying just to be as fair as
19 possible to Mr. Siemaszko in allowing him access to
20 the information. I mean, we still maintain that.
21 We're not really trying to hide anything. We just --
22 the interest of the Government is not having wider
23 disclosure of what is happening in a criminal
24 investigation.

25 CHAIRMAN McDADE: Mr. Siemaszko, anything

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1 further during this hearing?

2 MS. GARDE: I need a clarification on what
3 the Staff just said. I thought I heard her say that
4 if Mr. Siemaszko was not indicted they -- even if
5 others were, that they would not have any problem
6 turning the documents over to Mr. Siemaszko with the
7 -- within the restriction of some kind of protective
8 order. Is that what she said?

9 MS. BROCK: Yes, that's what I said. And
10 I -- what I said is I haven't discussed that
11 specifically with the Department of Justice, but I
12 don't -- based on all of my discussions with them, I
13 don't anticipate any problem with that.

14 MS. GARDE: But I think that fundamentally
15 flies in the face of your argument, and the reality of
16 a hearing like that, because then the protective order
17 that I think you would be anticipating would mean that
18 Mr. Siemaszko could get the documents, but he couldn't
19 do anything with them. He couldn't show them to
20 witnesses. He couldn't go to somebody and say, "Did
21 you really say this to OI? Because here is what it
22 says you said."

23 And I think what you are saying is that if
24 other people were indicted, and Andrew wasn't, we
25 would have our hands tied behind our backs just

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1 between the three of us. I mean, in terms of the
2 parties. We couldn't do anything with it. and we
3 wouldn't agree to that.

4 CHAIRMAN McDADE: Okay. This is Judge
5 McDade again. The Staff has made its position clear.
6 That doesn't necessarily mean it's going to be the
7 position we take. I don't know what position we're
8 going to take.

9 The hypothetical that I had posed would be
10 to turn the documents over to Mr. Siemaszko as of
11 September 19th pursuant to a protective order, and
12 then the question is: would that protective order run
13 out on its own as of the end of November, or would
14 that protective order stay until further order of the
15 Board?

16 And I was asking for comment on it. I
17 understand Mr. Siemaszko's position is that they would
18 be agreeable to -- or they would not oppose our
19 entering an order as long as as of November the order
20 were listed, so that they could then use those
21 documents in preparing their defense, use the
22 documents and interviewing witnesses, conducting
23 depositions. Have I correctly understood Mr.
24 Siemaszko's position?

25 MS. GARDE: Yes, you have.

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1 CHAIRMAN McDADE: Okay. Mr. Lockbaum,
2 anything further from Union of Concerned Scientists
3 before we ring off?

4 MR. LOCKBAUM: Yes. This is David
5 Lockbaum. I would just like to register our
6 disagreement with the NRC Staff regarding the effect
7 of the order. In a sense, it is an immediately
8 effective order, in that because of the order Mr.
9 Siemaszko basically can't get a job in the nuclear
10 industry.

11 We have been approached since -- in recent
12 weeks by two different parties who were looking for
13 people. I know a lot of people from both my pre-UCS
14 work and UCS work, so it's not uncommon for people to
15 contact me and say, "Do you know of anybody who can
16 fill this job? There's a job opening."

17 One was for the State of Illinois. The
18 State of Illinois has resident inspectors at all of
19 their operating nuclear powerplants. They needed a
20 resident inspector at one of those nuclear
21 powerplants. They sent me the job vacancy.

22 Mr. Siemaszko met or exceeded all of the
23 requirements for the job. When I recommended him
24 formally for the job, the State of Illinois had some
25 reservations because of this order. So they're

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1 basically not going -- even going to interview Mr.
2 Siemaszko for the job.

3 The other was a consulting firm in the
4 industry who employs people at a number of stations
5 around the United States. Same thing. They won't
6 even touch Mr. Siemaszko because of this order. So it
7 was, in a sense, an immediately effective order. It
8 would be virtually impossible for Mr. Siemaszko to get a
9 job anywhere, and that needs to be rectified so that
10 he could, if he wanted to and a party wanted to,
11 return to the nuclear industry and have gainful
12 employment.

13 Thank you.

14 CHAIRMAN McDADE: Thank you, Mr. Lockbaum.

15 MS. GARDE: Your Honor, this is Ms. Garde.

16 I'd like to make just one -- just make one other
17 comment. The Staff has, you know, throughout today
18 and the other calls that we have had, you know,
19 repeatedly stuck to their position that it's not
20 immediately effective. We've heard what David has
21 just said.

22 I just want to make sure -- and I think I
23 actually dropped it in a footnote in some brief --
24 that I was contacted by OI before this order was
25 issued to find out if Andrew was working, and directed

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1 that if he was reemployed I was directed to contact OI
2 and tell them. And I believe had he been working, it
3 would have been immediately effective, but OI knew he
4 wasn't.

5 So I don't want them to get more credit to
6 -- for this than is necessary. It doesn't change his
7 legal status. He wasn't working then; he isn't
8 working now. But it isn't as if they didn't know that
9 when they made the decision about whether or not to
10 make it immediately effective, or, in the absence of
11 me being directed, to notify them if he was.

12 CHAIRMAN McDADE: Okay. Judge Hawkens has
13 another matter.

14 JUDGE HAWKENS: I have two questions for
15 you, Ms. Brock. Number one, do you plan to submit an
16 in camera affidavit? And, if so, when would you
17 anticipate submitting it? And, number two, I share
18 Ms. Garde's concern about if, come November 30th, if
19 Mr. Siemaszko is not indicted, and if you find that
20 there's no objection by Department of Justice to turn
21 over all of the discovery materials pursuant to a
22 protective order, what would you envision being the
23 next step?

24 Because as I understood her concern, her
25 hands for further discovery would be tied, because

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1 although they would have access to it, they couldn't
2 pursue any further discovery avenues, because that
3 would be a violation of the protective order.

4 MS. BROCK: In terms of whether we plan to
5 submit an in camera affidavit, yes, I guess based on
6 this discussion we will. We'll do it as quickly as I
7 can get hold of the Department of Justice
8 Environmental Crimes attorneys. I'll try to file
9 something by the end of the week, hopefully sooner
10 than that.

11 The next question is about if he's not
12 indicted and the protective order -- I think if he's
13 not indicted, we can work out -- and we feel that a
14 protective order is necessary at that point, we can
15 work out a mutually agreeable order that would protect
16 the Government's interest and still allow them
17 discovery materials.

18 But I would emphasize, I do think that
19 that is a highly speculative state of affairs.

20 CHAIRMAN McDADE: What is a highly
21 speculative state of affairs?

22 MS. BROCK: That Mr. Siemaszko would not
23 be indicted, but that others would be.

24 CHAIRMAN McDADE: I guess we're going to
25 wrap this up. This is Judge McDade again. As I

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1 understand it, then, as soon as possible, hopefully
2 this week, and in any event at the latest by the end
3 of next week, the Staff, if they are going to submit
4 anything for in camera review, will do it.

5 I specifically ask that if you are going
6 to submit anything for in camera review, that you take
7 a look at the factors that we cited at page 6 of our
8 July 22nd order and try to address those; likewise, to
9 address the -- what I view as synonymous factors at
10 49 Federal Register 36033 that the Commission put out
11 for ongoing investigations. Those are the things I
12 think would be most helpful in any submission to us.

13 If there are any other pleadings that the
14 parties wish to submit on this -- well, let me ask,
15 other than that affidavit to be submitted in camera,
16 does the Staff envision filing anything else with us
17 on this issue of the stay?

18 MS. BROCK: No, Your Honor. We'll file a
19 -- some sort of cover letter that would go to all the
20 parties pursuant to the Commission investigation in
21 camera policy to show that we have filed it, but that
22 will be it.

23 CHAIRMAN McDADE: What about from Mr.
24 Siemaszko?

25 MR. CLIFFORD: Well, nothing further. And

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1 as I understand it right now, we have a brief or a
2 memorandum due tomorrow on the issues of -- the four
3 issues that were identified in the August 24 -- in the
4 Board's order, August 17th order. We'll be filing
5 that tomorrow. Is that right?

6 MS. GARDE: That's right. And I assume
7 that everyone received our notice that -- that our
8 firm will be largely unavailable for about the next 10
9 days. I don't want to be in default on anything, if
10 something gets filed.

11 CHAIRMAN McDADE: There will be no
12 deadline that occurs between now and at least a few
13 days after you all get back from Ireland.

14 MS. GARDE: Thank you, Judge.

15 JUDGE HAWKENS: I have one more.

16 CHAIRMAN McDADE: Judge Hawken has one
17 more thing, as do I.

18 JUDGE HAWKENS: I may have misunderstood,
19 but I -- I was under the impression that the two
20 counsel were going to try to work together to come up
21 with an agreement regarding a protective order. Is
22 that right?

23 MS. GARDE: You are right, Judge. We also
24 have to do -- to draft a more limited protective order
25 that we could live with to review the Ballantine

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1 affidavit and presumably any supplements.

2 JUDGE HAWKENS: Right. And assuming you
3 do do that, and get access to the Ballantine
4 affidavit, and perhaps what Ms. Brock intends to
5 submit in camera, would you then, at that point, wish
6 to revisit submitting some supplemental memorandum on
7 the stay issue?

8 MS. GARDE: Yes. Yes.

9 JUDGE HAWKENS: Thank you.

10 CHAIRMAN McDADE: Okay. And one other
11 thing that I wanted is -- and I believe you all are
12 going to be back on the 12th?

13 MS. GARDE: Yes, Your Honor.

14 CHAIRMAN McDADE: I don't have a calendar
15 in front of me. One of the things that I would like
16 the parties to do with regard to a protective order is
17 to discuss an order that could be entered that would
18 cover the turning over of documents on or about the
19 19th of September under 2.336, to see if you all can
20 reach an agreement on a protective order for those.

21 And, you know, I understand there may be
22 differences, for example, you know, whether or not it
23 would be self-terminating as of the end of November,
24 or whether or not it would require a further order to
25 be lifted, but to the degree that you can work out an

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1 order and just note what differences that you have.
2 If you can't reach an agreement, I'd ask that each of
3 you submit to us by no later than the 18th of
4 September a proposal. So either a proposal, or, if
5 you can't reach an agreement --

6 THE COURT REPORTER: Excuse me, Your
7 Honor. Your voice is clicking out on the instructions
8 that you're giving right now.

9 CHAIRMAN McDADE: Okay. To submit a draft
10 protective order to cover the -- the documents. If
11 you can do one that is joint, great. If not, if
12 you --

13 THE COURT REPORTER: I'm sorry, Your
14 Honor, to interrupt again. I'm still not catching
15 what you're saying.

16 CHAIRMAN McDADE: Okay. I'm practically
17 sitting on the phone here. So, you know, I can't get
18 a whole lot closer without my voice truly starting to
19 get mumbled by my lips, you know, going against the
20 speaker.

21 MR. CLIFFORD: Your Honor, this is John
22 Clifford speaking.

23 CHAIRMAN McDADE: Yes.

24 MR. CLIFFORD: There are some papers
25 rattling, perhaps where you're sitting, and that's

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1 what's making it cut in and out.

2 CHAIRMAN McDADE: There's no papers here
3 to rattle.

4 MR. CLIFFORD: Okay.

5 CHAIRMAN McDADE: But in any event, let me
6 just make it clear what I was saying and repeat it.
7 That currently there are documents -- discover that is
8 due on September 19th. We have not either extended
9 that or ruled on that in any way. We have discussed
10 the possibility that those would be made available on
11 September 19th, pursuant to a protective order.

12 We would ask that the parties get together
13 to see if they could agree on a protective order. If
14 not, we would ask that you each submit your proposed
15 protective orders no later than the 18th of September,
16 so that we could review those and decide whether a
17 protective order is appropriate, or whether or not a
18 further delay after the September 19th date would be
19 appropriate with regard to those.

20 From the Staff, Ms. Brock, do you have any
21 questions on that?

22 MS. BROCK: No, that's fine, Your Honor.
23 I think our obligations are to submit the in camera
24 affidavit by the end of the week, that the -- Clifford
25 and Garde will send us a draft protective order, and

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1 we should discuss with them a further protective
2 order.

3 The only I guess comment I would have is
4 we just wouldn't want to see any draft protective
5 order to cover documents released on September 19th as
6 -- perceived as agreement that that is an acceptable
7 resolution from the Staff perspective.

8 CHAIRMAN McDADE: I understand.

9 MS. BROCK: Okay.

10 CHAIRMAN McDADE: From Mr. Siemaszko?

11 MS. GARDE: Nothing, Your Honor.

12 CHAIRMAN McDADE: From Mr. Lockbaum?

13 MS. GARDE: Wait. I do have one -- one
14 thing, Your Honor. Just by way of notice,
15 unfortunately, Mr. Siemaszko is living in the New
16 Orleans area. And although I believe I have probably
17 80 to 90 percent of his documents, I haven't been able
18 to talk to him since the hurricane.

19 And so even if we are ordered to turn this
20 stuff over on the 19th, I may have a small -- I won't
21 probably have all of his additional material. I don't
22 even want to say that that's true. He may say, in
23 fact, "Billie, you have 100 percent of everything."

24 But I am having client contact
25 difficulties that might impact that date, if we have

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1 a turnover.

2 CHAIRMAN McDADE: Okay. What I would ask
3 you to do, then, is to notify us and the Staff if
4 there is going to be a problem, say, two days before
5 the 19th. And one of the possibilities might be to
6 just have everything pushed a week or two weeks.

7 If it doesn't look like you'll meet the
8 19th date, two days before that if you could notify
9 the Staff, if you can agree on an extension -- in
10 other words, say, "Look, we can have it by the 25th,
11 or we can have it by the 30th," and you all just agree
12 on another date, that will be fine with us. Just let
13 us know, and we'll put our imprimatur on it. If you
14 can't agree, then just request another prehearing
15 conference.

16 I had a wager with Judge Hawkens that this
17 conference today would take about 15 minutes. So I
18 lose. If we have another one, hopefully I'll -- I'll
19 be successful in estimating the duration.

20 But, Mr. Lockbaum, do you have anything
21 further?

22 MR. LOCKBAUM: No, thank you, Your Honor.

23 CHAIRMAN McDADE: Thank you very much.

24 (Whereupon, at 3:27 p.m., the proceedings
25 in the foregoing matter were concluded.)

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In the Matter of

Andrew Siemaszko

Docket Number: 05-839-02-EA

Location: teleconference

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