

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 REPLY TO RESPONSE OF OHIO CITIZEN ACTION
AND UNION OF CONCERNED SCIENTISTS REGARDING
DISCRETIONARY INTERVENTION AND REPRESENTATION

INTRODUCTION

Pursuant to the August 2, 2005 Order “Ruling Denying the Request for Hearing of Ohio Citizen Action/Union of Concerned Scientists and Requesting Briefs on the Appropriateness of Discretionary Intervention” (August 2 Order), the NRC Staff (Staff) hereby replies to the August 12, 2005 Response of Ohio Citizen Action and Union of Concerned Scientists Regarding Discretionary Standing and Representation (August 12 Response). For the reasons set forth below, the Staff opposes Ohio Citizen Action/Union of Concerned Scientists’ request for discretionary intervention and joint representation.

BACKGROUND

On April 21, 2005, the Staff issued an “Order Prohibiting Involvement in NRC-Licensed Activities” (Enforcement Order) to Andrew Siemaszko, who was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by NRC licensee FirstEnergy Nuclear Operating Company (FENOC). 70 Fed. Reg. 22719.

On April 22, 2005, Mr. Siemaszko filed his “Request for a Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities”. On May 13, 2005, Ohio Citizen Action and Union of Concerned Scientists (Petitioners) filed their “Request for Hearing in Response to

Order (IA-05-021) Banning Andrew J. Siemaszko From Involvement in NRC-Licensed Activities” (Petition), in which they requested leave to intervene. On August 2, 2005 (August 2 Order), the Board issued a ruling denying standing as a matter of right to the Petitioners, but requested the Petitioners submit a statement whether they wish the Board to consider granting them discretionary intervention in this proceeding pursuant to 10 C.F.R. § 2.309(e). August 2 Order at 5. The Board particularly emphasized the question of whether Petitioners’ participation would assist in developing a sound record in this proceeding. *Id.* at 6. All participants were also ordered to state their position on whether it would be appropriate to consolidate the Union for Concerned Scientists and Ohio Citizen Action pursuant to 10 C.F.R. § 2.316, and to allow them to proceed jointly under the representation of Mr. David Lochbaum. August 2 Order at 7-8.

On August 12, 2005 the Petitioners filed their “Response of Ohio Citizen Action and Union of Concerned Scientists Regarding Discretionary Standing and Representation” (August 12 Response), in which they specifically request the Board to consider discretionary intervention and affirm that Mr. Lochbaum is a paid employee of UCS and that he is a member of OCA. The Staff hereby submits its Reply.

DISCUSSION

A. Discretionary Intervention

The standards governing discretionary intervention are set forth in 10 C.F.R. § 2.309(e). In its statement of consideration for the final rulemaking, the Commission explained that it was codifying the six-factor test presented in *Portland General Electric Co.* (Pebble Springs), CLI-76-27, 3 NRC 610 (1976), and that the case law evolving from the *Pebble Springs* decision should be applied in evaluating a request for discretionary intervention. 69 Fed. Reg. 2182,

2201 (January 14, 2004). Section 2.309(e) requires that, in the initial petition¹ a petitioner seeking discretionary intervention shall address the following three factors weighing in favor of allowing intervention: (i) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record; (ii) the nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and (iii) the possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest. 10 C.F.R. § 2.309(e)(1)(i)-(iii). A petitioner shall also address the following three factors weighing against allowing intervention: (i) the availability of other means whereby the requestor's/petitioner's interest will be protected; (ii) the extent to which the requestor's/petitioner's interest will be represented by existing parties; and (iii) the extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding. 10 C.F.R. § 2.309(e)(2)(i)-(iii).

In its statements of consideration for the final rulemaking, the Commission explained that the criteria set forth in 10 C.F.R. § 2.309(e) presume that "discretionary intervention is an extraordinary procedure, and will not be allowed unless there are compelling factors in favor of such intervention." 69 Fed. Reg. at 2201. In the circumstances of the instant proceeding, it is clear that all factors weigh heavily against allowing the Petitioners to intervene in this proceeding and that no compelling factors have been established which might warrant discretionary intervention.

¹ The regulations required that the Petitioners address the factors for discretionary intervention in their initial petition, along with their arguments for standing. 10 C.F.R. § 2.309(e). In the instant case, the Petitioners did not request discretionary intervention in their initial pleading. The Petitioners had the right, pursuant to 10 C.F.R. § 2.302 to reply to the Staff's Response filed in opposition to their Petition; they chose not to. The Petitioners had an additional opportunity to request discretionary intervention at the pre-hearing conference held June 16, 2005, yet they did not. The Board then gave the Petitioners an additional opportunity to supplement their Petition. In that supplement, dated June 24, 2005 ("Reply of Ohio Citizen Action and Union of Concerned Scientists to NRC Staff Response to Hearing Request"), the Petitioners still did not request discretionary intervention.

1. The Petitioners Are Not Likely to Contribute to the Development of a Sound Record

In the statements of consideration for the 10 C.F.R. § 2.309(e) final rulemaking, the Commission explained, "The ultimate purpose of an adjudicatory proceeding is to resolve material issues with respect to an NRC regulatory action." *Id.* Accordingly, "The discretionary intervention standards, properly applied, should ensure that only persons and entities who can meaningfully contribute to the development of a sound record on contested matters will be admitted as parties." *Id.* The ability of the Petitioners to assist in developing a sound record is, therefore, the paramount factor in determining whether Petitioners should be granted discretionary intervention. August 2 Order at 5, FN 13. *See also Pebble Springs*, CLI-76-27, 4 NRC at 617; 69 Fed. Reg. at 2201. In asserting their ability to develop a sound record in this proceeding, the Petitioners must show "significant ability to contribute on substantial issues of law or 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." *Pebble Springs*, CLI-76-27, 4 NRC at 617.

As the subject of this proceeding is an enforcement action against Mr. Siemaszko, the evaluation of the Petitioners' ability to develop a sound record must rest on whether they can contribute unique and specific information based on their direct knowledge of the facts and legal issues underlying that specific action. "[T]he only record to be developed necessarily must be keyed to the events recited in the order and to a consideration of whether they support the order's various provisions." *Consumers Power Co. (Palisades)*, ALAB-670, 15 NRC 493, 502 (1982). Not only must the Petitioners be able to contribute information that is focused on the terms of the Enforcement Order, but that information must be based on direct knowledge of the particular facts of the case. The Commission has held that "generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues

actually in dispute." *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35 (1998). That admonition appears to be especially apt in the context of an enforcement action against an individual such as is involved here. A public interest organization, such as UCS or OCA, whose membership may include scientists of unquestioned accomplishment and renown, would be unlikely to add significantly to the development of a sound record where the intervention petition is deficient with regard to the specific subject matter of the proceeding. *See Id.*

Petitioners have failed to establish that they possess any direct knowledge of the facts underlying the Enforcement Order at issue here. In describing their ability to contribute information as to whether Mr. Siemaszko provided incomplete and inaccurate information on the cleaning of the RPV head, the Petitioners indicate that they possess transcripts and summaries of interviews conducted by the NRC Office of the Inspector General of NRC and FirstEnergy staff members. August 12 Response at 2. Petitioners further offer that they have "monitored events at Davis-Besse quite closely since . . . 2002," and that they have "acquired a deep and thorough understanding of the information within the many documents that exist regarding conditions at Davis-Besse." *Id.* The Petitioners' knowledge of the facts and issues underlying the terms of the Enforcement Order against Mr. Siemaszko is only second-hand, deriving from documents generated within the NRC and from a compilation of "many documents that exist regarding conditions at Davis-Besse." The Petitioners have not demonstrated that they possess any direct knowledge as to whether Mr. Siemaszko actually provided an incomplete and inaccurate description of the work actions taken relative to the presence of boric acid deposits on the RPV head.

Furthermore, the basis of the Petitioners' claimed knowledge is too vague to be useful in evaluating their ability to contribute to the development of the record. The Petitioners are not specific about which NRC reports they possess or which of the "many documents that exist

regarding conditions at Davis-Besse” they purport to have. As to their ability to provide information on whether the five-year suspension of Mr. Siemaszko is an appropriate level of sanction, the Petitioners assert that they possess "considerable institutional knowledge of the NRC enforcement policy and its implementation." *Id.* This statement indicates that the Petitioners may have a generalized knowledge on NRC enforcement matters, but it does not establish that the Petitioners can offer any specific information on the appropriateness of the particular sanction issued against Mr. Siemaszko in this case.

Finally, the Petitioners’ access to this information is not unique and thus would not contribute to the meaningful development of the record. The Petitioners were granted access to redacted versions of interview summaries and transcripts from an investigation of the events at Davis-Besse conducted by the NRC Office of the Inspector General in 2002. The information contained in those redacted documents is already in the public domain, notably through the Petitioners’ own publication of this information. August 12 Response at 3. In fact, the Petitioners promised to make this information available to the public in their FOIA fee waiver request dated January 9, 2003. See Attachment A, Copy of FOIA Request Submitted by David Lochbaum. Thus, the Petitioners can claim no unique access to this information. The Petitioners’ contribution of that information would, therefore, be redundant and would not meaningfully contribute to the development of the factual record in this proceeding.

As the Petitioners have not established that they would be likely to assist in developing a sound record in this proceeding, this paramount factor weighs heavily against granting discretionary intervention to the Petitioners. See 10 C.F.R. § 2.309(e)(1)(i).

2. The Petitioners Have Not Articulated Any Direct Property, Financial or Other Interest in This Proceeding

The Petitioners do not assert any direct interest in the outcome of this proceeding. Only in rare circumstances has a party seeking discretionary intervention in an enforcement

proceeding been able to show a direct interest in the outcome of that proceeding. One such case occurred in the *Palisades* decision, where the Appeal Board granted discretionary intervention to a licensee's labor union in an enforcement action involving that licensee. ALAB-670, *supra*, 15 NRC at 502. In *Palisades*, the Appeal Board held that the potential financial loss to plant operators resulting from the Staff's order limiting the number of overtime hours constituted a direct interest sufficient to merit discretionary intervention for the union representing those workers. *Id.* at 502. In contrast, the Petitioners in the instant case do not assert that any property, financial, or other loss would occur to them as a direct result of sustaining the Enforcement Order against Mr. Siemaszko. In the section of their August 12 Response addressing this factor, the Petitioners only refer to their stated interest as detailed in their prior filings. *Id.* at 4. The Petitioners argued in their initial Petition that their interest in this proceeding arises from the considerable amount of time, money, and effort they have invested in following the NRC's investigation of Davis-Besse. *Id.* at 4. That expenditure of resources does not, however, constitute a direct interest in this proceeding, as the Petitioners spent their resources voluntarily and independent of the terms of the Enforcement Order issued against Mr. Siemaszko.

The Petitioners also state in their initial filing that sustaining the Enforcement Order "has a very real potential for undermining worker and public confidence in the NRC's oversight capability." Petition at 4. The Petitioners appear to argue that sustaining the Enforcement Order would, consequently, have the effect of conflicting with their purported interest in promoting fair and consistent application of the NRC's enforcement policy. *Id.*; August 12 Response at 4. As this Board has already held, a generic evaluation of the NRC's enforcement policy and practices falls beyond the scope of this hearing. August 12 Order at 7. Such a concern, accordingly, is not relevant in determining whether the Petitioners have a sufficient interest at stake in this hearing warranting their participation.

As the Petitioners have presented no direct interest in the outcome of this proceeding, this factor weighs heavily against the Petitioners' request for discretionary intervention. See 10 C.F.R. § 2.309(e)(1)(ii).

3. The Petitioners Have Not Stated Any Relevant Effect the Outcome of This Proceeding May Have on Their Interests

In addressing this factor in their August 12 Response, the Petitioners again only provide reference to their prior filings discussing the possible effect that the outcome of this proceeding may have on their interests. *Id.* at 5. As discussed above, the Petitioners have not established a cognizable interest in the terms of the Order issued against Mr. Siemaszko. Thus it follows that the outcome of this proceeding will not have a direct effect on the Petitioners, and this factor weighs against allowing the Petitioners to intervene. See 10 C.F.R. § 2.309(e)(1)(iii).

4. Other Means Exist Whereby the Petitioners' Interests May Be Represented

Other, more appropriate, means are available by which the Petitioners may pursue their interests. In the Petitioners' discussion of this factor in their August 12 Response, they refer to Contention 5 as stated in footnote 20 to the Board's August 2 Order,² which raises the issue of

² The Staff notes that contention 5, as redrafted by the Board in footnote 20 of its August 2 Order, is substantially different from the original contention set forth in the initial petition. The Petitioners' contention 5 states: "The NRC cannot single out Mr. Andrew J. Siemaszko for enforcement action because his action and his actions alone were not responsible for either the severity or longevity of the problems at Davis-Besse." Petition at 16. The Petitioners further explain their basis for this contention: Mr. Siemaszko was but one of many passengers on the Davis-Besse bus as it sped along with an improper safety focus. The NRC should ticket the driver of the bus or the driver and all the passengers. The NRC cannot drag one passenger from the rear of the bus and persecute him alone.

Id. It is apparent from this language that the Petitioners seeks to address broad correction of the NRC enforcement program through contention 5.

The August 2 Order rewrote and limited contention 5 to: "Whether the 5 year suspension of Mr. Siemaszko, in light of all relevant aggravating, mitigating, and extenuating circumstances, is an appropriate sanction in this matter." *Id.* at 7. It is well established, however, that if a petitioner neglects to provide adequate support for its contentions, it is not within the Board's power make inferences and redraft the contention in favor of the petitioner. See *Arizona Public Service Commission* (Paolo Verde), CLI-91-12, 34 NRC 149 (1991). See also *Georgia Institute of Technology* (Georgia Tech Research

(continued...)

whether the 5 year suspension of Mr. Siemaszko is appropriate. August 12 Response at 5. The Petitioners assert that this proceeding is their only opportunity to address that question. *Id.* It is apparent that the underlying interest the Petitioners actually seek to address is the broader issue of the deficiencies they perceive in the NRC enforcement policy and practices. The Petitioners seek to challenge the appropriateness of the sanction against Mr. Siemaszko in that the Petitioners are dissatisfied with the overall degree of sanctions the NRC issues in applying its enforcement policy. *Id.* General criticism of the NRC's enforcement practices, however, exceeds the scope of this hearing. August 2 Order at 7. Other forums exist for such generalized concerns. August 2 Order at 7, FN 21. Because this proceeding is not an appropriate forum for generic enforcement policy criticism and because other means are available by which the Petitioners' interests may be pursued, this factor weighs against allowing the Petitioners to intervene. See 10 C.F.R. § 2.309(e)(2)(i).

5. The Petitioners' Interest Will Be Represented by Existing Parties

The Petitioners have not established that their participation in this proceeding is necessary to represent their interests. As discussed above, the Petitioners have not articulated a cognizable interest that would be directly affected if the Enforcement Order against Mr. Siemaszko is sustained. Even if the Petitioners' asserted interests in this matter were found to be relevant in determining whether they should be allowed to intervene, discretionary intervention is not warranted, as the Petitioners concede that they "expect that Mr. Siemaszko will primarily pursue these shared or overlapping interests and that our level of engagement during the proceeding will be limited to supplementing that effort on occasion." August 12 Response at 5. The only matter within the scope of this hearing is whether or not to sustain the

²(...continued)
Reactor), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995).

Enforcement Order against Mr. Siemaszko, and it can be reasonably expected that Mr. Siemaszko would adequately represent that interest himself. This factor, therefore, weighs against the Petitioners. See 10 C.F.R. § 2.309(e)(2)(ii).

6. The Petitioners' Participation Would Likely Broaden and Delay This Proceeding

The Petitioners' participation would inappropriately broaden the issues and delay the proceeding. The only issues appropriate for discussion in this hearing are whether the Enforcement Order against Mr. Siemaszko is supported by the facts of the case and whether the 5 year sanction is appropriate. August 2 Order at 7. The Petitioners have conceded that they intend to use this hearing as a vehicle by which to pursue their broader goal of seeking programmatic correction of the NRC's enforcement policy and practices. This is the wrong forum for such generalized goals. The Petitioners state that they "envision obtaining a sound record that the Board seeks that will provide us the body of information needed to pursue fixing the enforcement policy through direct engagement with the NRC staff and other processes available to us outside of this proceeding." August 12 Response at 5. As this Board has already declared that a general attack on the NRC's enforcement policy and practices would exceed the scope of this hearing, it follows that the Petitioners' participation would inappropriately broaden the issues and delay the proceeding. This factor, therefore, weighs heavily against allowing the Petitioners to intervene. See 10 C.F.R. § 2.309(e)(2)(iii).

B. Consolidation and Joint Representation of Parties

The Staff opposes consolidation of the Petitioners pursuant to 10 C.F.R. § 2.316. Neither OCA nor UCS has not made any showing in the August 12 Response that they have an interest that may be affected by the outcome of this proceeding, or more importantly, that they would be able to contribute anything to the meaningful development of a sound record. The Staff further notes that the Petitioners have not yet provided a clear statement of

representation. The regulations provide that an organization may be represented by a duly authorized member or officer. The representative must file with the Commission a written notice of appearance, which must state the basis of his or her authority to act on behalf of a party. *Id.* While the Petitioners have provided a clear statement of Mr. Lochbaum's membership in OCA, the Petitioners have not indicated that Mr. Lochbaum is duly authorized to represent that OCA, nor has Mr. Lochbaum filed a notice of appearance to that effect. Furthermore, Mr. Lochbaum has not yet filed a notice appearance establishing his authority to represent UCS. The Staff, therefore, objects to the joint representation of OCA and UCS by Mr. Lochbaum until he has complied with this procedure. In any event, should the Board deny discretionary intervention as recommended by the Staff, this issue becomes moot for purposes of this proceeding.

CONCLUSION

For the reasons stated above, the Staff hereby opposes discretionary intervention for the Petitioners. The Staff objects to the consolidation of the Petitioners pursuant to 10 C.F.R. § 2.316, and also objects to their joint representation by Mr. Lochbaum until a clear statement of his authorization to represent OCA has been made.

Respectfully Submitted,

/RA/

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO RESPONSE OHIO CITIZEN ACTION AND UNION OF CONCERNED SCIENTISTS REGARDING DISCRETIONARY STANDING AND REPRESENTATION" 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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