

December 6, 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 MOTION TO EXTEND THE STAY OF THE PROCEEDING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Staff of the Nuclear Regulatory Commission (Staff), at the request of the Department of Justice (DOJ), moves the Atomic Safety and Licensing Board for an order further staying all proceedings in the matter for an additional 55 days, until February 1, 2006.¹ Pursuant to 10 C.F.R. § 2.323(b) counsel for the Staff contacted counsel for Mr. Siemaszko to attempt to resolve the issue. Counsel for Mr. Siemaszko is opposed to staying this proceeding.

BACKGROUND

Andrew Siemaszko, was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by FirstEnergy Nuclear Operating Company (FENOC). On April 21, 2005, the Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities" (Order) to Mr. Siemaszko. 83 Fed. Reg. 22719 (2005).

The Order prohibits Mr. Siemaszko from any involvement in NRC-licensed activities for

¹ As previously stated, in the event that the Grand Jury returns indictments that include Mr. Siemaszko, this would present new circumstances under which the Staff does anticipate requesting another stay of this proceeding. See *Transcript of August 30, 2005 PreHearing Conference at 26* (Aug. 30, 2005 Transcript).

a period of five years from the effective date of the Order.²

On April 22, 2005, Mr. Siemaszko filed his "Request for a Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities," (Hearing Request) and denied the allegations contained in the Order. On May 17, 2005, the NRC Staff filed a "Motion for Delay of Proceeding." On July 22, 2005, the Board issued an Order "Granting the NRC Staff's Motion for a 120-Day Delay of Proceedings and Setting Case Schedule." On August 19, 2005, the NRC Staff filed "NRC Staff Motion to Extend the Stay of the Proceeding," with an Affidavit under seal attached. On September 8, 2005, The Staff filed a supplemental Affidavit under seal in support of the stay request. On September 29, 2005 the Board issued an Order "Granting the NRC Staff's Motion for a Stay of this Proceeding until November 30, 2005." For the reasons set forth below, the Staff moves the Board for an additional stay of the above captioned proceeding.

DISCUSSION

A. Commission Policy Supports Staying Administrative Proceedings when Criminal Proceedings are Ongoing

Longstanding Commission policy supports an additional stay of fifty-five days in the instant case. In promulgating its rules on challenges to orders the Commission explicitly included a provision allowing the presiding officer to stay a hearing for good cause. See Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20194, 20197 (May 12, 1992). The Commission specifically noted that the pendency of a criminal investigation was an example of good cause for staying an administrative hearing. *Id.* Moreover, the Memorandum of Understanding (MOU) between the NRC and the Department of Justice reflects that the Staff will seek a stay of discovery and

² Since the Order was not immediately effective and a hearing was requested, the Order is not effective until the conclusion of the hearing process.

hearing rights during the regulatory proceeding to accommodate the needs of a criminal investigation or prosecution. See MOU Between the NRC and DOJ, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988). The NRC Staff seeks a stay consistent with the MOU in order to protect the criminal proceeding, a strong governmental interest.

Furthermore, the scope of discovery in the instant case vastly exceeds the scope of discovery in a criminal case. Pursuant to 10 C.F.R. § 2.705-2.708 a litigant in an enforcement proceeding is entitled to a full range of civil discovery methods including interrogatories, document requests, and depositions. It is well established that a litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit to avoid the restrictions on criminal discovery and thereby obtain documents he might not otherwise be entitled to for use in his criminal suit. See *Campbell* at 487; *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 380 (D. DC 1977). Broad disclosure of the essentials of the prosecution's case may result in perjury or manufactured testimony on the part of the defendant. See *Campbell* at 487 n.12. See also *September 8th Ballantine Affidavit*. The revelation of the prosecution's witnesses or informants creates the opportunity for witness intimidation. *Id.* As discussed at the pre-hearing conference on August 30, 2005 the Staff has, in fact, received an allegation of retaliation for testifying before the Grand Jury investigating the events surrounding the Davis-Besse Reactor Vessel Head cavity. See *August 30, 2005 Transcript* at 23.

Criminal defendants maintain the right to assert the self-incrimination privilege, blocking the prosecution from a major source of discoverable information. If prosecutors were obligated to provide the liberal discovery required in civil proceedings, the defendant would gain a significant advantage. Limiting the defendant's opportunity to obtain discovery in criminal cases is an attempt to balance this inequity. Without a stay in the instant administrative case while the criminal investigation is still pending, Mr. Siemaszko may assert the self-incrimination privilege during civil discovery, thereby circumventing the intent to balance the inequities in the

criminal proceeding. This potential is not speculative. Notably, Mr. Siemaszko's wrongful termination suit before the Department of Labor was stayed in light of his assertion of his self-incrimination privilege. See *In the Matter of Andrew Siemaszko v. First Energy Nuclear Operating Company*, 2003-ERA-13 "Order Staying Proceeding and Canceling Hearing," August 27, 2004. In light of the Commission policy and overarching governmental interest in the criminal proceeding, a further stay of 55 days should be granted.

B. Legal Standards Governing Stays of Proceedings

The Commission's regulations at 10 C.F.R. § 2.202(c)(2)(ii) permit a presiding officer to stay a hearing of an immediately effective order when good cause exists.³ The Commission has previously held that the determination of whether good cause exists for a stay requires a balancing of competing interests. See *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 50 (1993). The factors to be considered in balancing these interests are; the length of delay, the reason for the delay, the affected individual's assertion of his right to a hearing, prejudice to the affected person, and the risk of an erroneous deprivation. See *Id.* Those factors are discussed below.

1. Length of and Reason for Stay

The first factor, length of the stay, and the second factor, the reason for the stay, are closely related. In the instant proceeding, the total length of the stay of the proceeding, including the current request for an additional fifty-five day stay, will be approximately nine months from the issuance of the Order. Stays of more than nine months have been routinely upheld. See *Oncology Services Corp.*, LPB-93-20, 38 NRC 130 (1993) (The Staff was

³ The instant case is not an immediately effective order. When the Staff has issued an immediately effective order and requests a stay, a person subject to the Order suffers a legally cognizable harm during the pendency of the stay request and hearing. In the instant case, Mr. Siemaszko has not yet suffered any legally cognizable harm, therefore the standard for granting a stay should be somewhat more lenient.

granted a total stay of 11 months in *Oncology*, the Order was issued on January 20, 1993 and the final stay was granted through December 6, 1993). *See also United States v. U.S. Currency in the Amount of \$228,536.00*, 895 F.2d 908, 917 (2nd Cir. 1990) (forfeiture action commenced after stay of almost four years). The reason for the stay and the length of the stay are due to the pendency of Grand Jury proceedings. *See Affidavit of Thomas T. Ballantine* dated December 5th at 5 (Dec. 5th Ballantine Affidavit).⁴ The specific reasons for the change in the length of time are discussed in the Affidavit. *See Id.* The Grand Jury proceeding has the potential to materially alter this case in the event an indictment is returned against Mr. Siemaszko. Administrative policy gives priority to the public interest in law enforcement and a trial judge should give such public interest substantial weight in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims. *See Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962); *United States v. Hugo Key and Son*, 672 F. Supp. 656 (D. RI 1987). In light of the strong governmental interest in protecting the criminal investigation, these factors weigh heavily in favor of the Staff.

2. Mr. Siemaszko's Assertion of the Right to a Hearing and Prejudice

The second two factors in the balancing test are Mr. Siemaszko's assertion of the right to a hearing and prejudice to Mr. Siemaszko. The Staff does not dispute that Mr. Siemaszko has requested a prompt hearing, therefore this factor weighs in favor of Mr. Siemaszko. However, as previously recognized by the Board, this factor should not weigh heavily on the scales of this case.

The last factor, prejudice to Mr. Siemaszko weighs neither for or against Mr. Siemaszko. Mr. Siemaszko is, quite simply, not prejudiced by a stay in the proceeding. While it is true that

⁴ The *Dec. 5th Ballantine Affidavit* is filed under seal and contains additional detail in support of the motion. Since the *Ballantine Affidavit* is under seal it is not included in the electronic version of this filing.

Mr. Siemaszko is not currently employed in the nuclear industry, this condition existed prior to the issuance of the Staff Order in April. Mr. Siemaszko was terminated from employment at Davis-Besse in September, 2002 and has not been successful in becoming re-employed in the nuclear industry. See *Transcript of June 16, 2005 Pre-Hearing Conference*, at 61-62.

Moreover, Mr. Siemaszko has himself publically stated that he has been informed he is a target of the Grand Jury. See *Id.* at 55. The Order to Mr. Siemaszko was not made immediately effective, so Mr. Siemaszko is not prohibited from employment in the nuclear industry during the pendency of this proceeding. In light of his termination from FENOC and his public announcement that he has been targeted by the Grand Jury it is difficult to tie his lack of employment to the Staff's Order. Therefore, these two factors weigh only slightly in favor of Mr. Siemaszko.

3. Risk of Erroneous Deprivation

The final factor is risk of erroneous deprivation. This factor weighs heavily in favor of the Staff. Since the Order was not immediately effective, Mr. Siemaszko has not yet been deprived of anything. Mr. Siemaszko has not yet suffered a change in legal status or any other legally cognizable harm as a result of the Order. Therefore, this factor weighs heavily in favor of the Staff.

CONCLUSION

On balance, the factors establish that good cause exists for an additional stay of the proceeding through February 1, 2006. There is an overriding public interest, the pending Grand Jury investigation, which justifies the delay, and there is no risk of erroneous deprivation, since the order is not immediately effective. The Staff's motion for a stay should, therefore, be granted.

Respectfully submitted,

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/RA/

Sara E. Brock
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of December, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION TO EXTEND THE STAY OF THE PROCEEDING" 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 6th day of December, 2005.

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