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ITMO of Andrew Siemaszko

Docket Number: IA-05-021; ASLBP No.: 05-839-02-EA

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL
PRE-HEARING CONFERENCE

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IN THE MATTER OF:	Docket No. IA-05-021
ANDREW SIEMASZKO	ASLBP No. 05-839-02-EA

Thursday, December 15, 2005

The above-entitled matter came on for hearing, pursuant to notice, at 12:30 p.m.

BEFORE:

- LAWRENCE MCDADE, Chair
- E. ROY HAWKENS, Administrative Judge
- PETER S. LAM, Administrative Judge

1 APPEARANCES:

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

12:29 P.M.

ADMIN. JUDGE McDADE: Okay, why don't we have this pre-hearing conference come to order. My name is Lawrence McDade. To my right, your left is Judge Hawkens; and to my left, your right, is Judge Lam.

For the record, will you please identify yourself, from the NRC Staff?

MS. BROCK: Sara Brock and Steven Hamrick on behalf of the NRC Staff.

ADMIN. JUDGE McDADE: Okay, for Mr. Siemaszko?

MS. GARDE: John Clifford and Billie Garde on behalf of Mr. Siemaszko and with us is our paralegal, Sandy Shepherd.

ADMIN. JUDGE McDADE: And Mr. Lochbaum?

MR. LOCHBAUM: Dave Lochbaum from the Union of Concerned Scientists and Ohio Citizen Action.

ADMIN. JUDGE McDADE: Thank you. Let me go over a couple of preliminary matters before we really get started on the content of today's conference which is the Motion for Stay presented by the NRC Staff.

With regard to matters that are currently

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1 outstanding, first of all, we have made a
2 determination that we are going to grant intervenor
3 status to the Union of Concerned Scientists and Ohio
4 Citizen Action to be represented jointly by Mr.
5 Lochbaum.

6 We anticipate issuing an omnibus order
7 next week that will include all of the outstanding
8 issues and we'll have that in the content of the
9 order.

10 The other thing that we wanted to note was
11 with regard to the scope of the proceeding, that in
12 our original order we indicated what we believed the
13 scope of the proceeding to be, based on the order that
14 had been issued to initiate these proceedings, that
15 there had then been objections to that and the matter
16 had been significantly briefed.

17 Based on the briefing that we have
18 received, we determined that we agree with the NRC
19 Staff and we will allow them to proceed as they
20 proposed in their pleadings and specifically we will
21 be issuing an order next week which sets forth the
22 scope of the proceeding and specifically, it will be
23 that they would be able to prevail in this particular
24 instance if they were to demonstrate that Mr.
25 Siemaszko intentionally made a false statement in a

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1 matter within the jurisdiction of the NRC, that they
2 do not need to prove that he knew that by submitting
3 that information he would cause his employer to be in
4 violation of NRC regulations.

5 That brings us to the matter at hand which
6 is the Motion for Stay presented by the NRC Staff. A
7 preliminary to that has to do with a request that was
8 filed by Mr. Siemaszko the other day, specifically to
9 get access to affidavits; specifically, affidavits
10 that were signed by Mr. Ballantine of the Department
11 of Justice that have been submitted to the Board in
12 camera in support of the Motions for Stay, with the
13 request, Mr. Siemaszko's attorneys also submitted a
14 proposed protective order.

15 Let me ask of the NRC Staff, what is your
16 position with regard to granting access to those
17 affidavits to Mr. Siemaszko and his attorneys?

18 MS. BROCK: The NRC Staff is fine with
19 granting access to Mr. Siemaszko and his attorneys.
20 We do still have a few points of contention with the
21 proposed protective order. And I can go over those if
22 you want.

23 ADMIN. JUDGE McDADE: Please.

24 MS. BROCK: The first one is the timing of
25 the protective order. We're concerned that this

1 proceeding could terminate and the protective order --
2 and a criminal proceeding could still be on going in
3 some form, even if it doesn't directly relate to Mr.
4 Siemaszko. And the Department of Justice is concerned
5 that those affidavits not be released at that time.
6 So we would like that to read that the protective
7 order will remain in effect, notwithstanding any order
8 terminating the proceeding.

9 The protective order lacks the statement
10 that the affidavit can only be used for this
11 proceeding and we're concerned about that. And we're
12 concerned about the lack of a nondisclosure agreement
13 attached to this protective order and we are concerned
14 that it eliminated the sanctions from the order and
15 made the sanctions of the order solely rest with the
16 Board.

17 And our concern about that is that we've
18 certainly had experience in the past where protective
19 orders, there's concerns about protective order that
20 comes up after the jurisdiction the Board has
21 terminated and it becomes an order of the Nuclear
22 Regulatory Commission, subject to our regular
23 enforcement process.

24 So those are the main points of contention
25 and I think these are all things that we had discussed

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1 in September. We were attempting to reach agreement.
2 We discussed, Ms. Garde and I, and Mr. Clifford and I
3 had discussed these issues in September.

4 ADMIN. JUDGE McDADE: Okay, well, let's
5 sort of go through them one at a time and get the view
6 of Mr. Siemaszko with regard to the issues that you
7 raise.

8 The first one has to do with -- would you
9 repeat it?

10 MS. BROCK: With the timing of the
11 protective order, the way we had written the
12 protective order, it said the order would remain in
13 effect notwithstanding any order terminating the
14 proceeding and the way Mr. Siemaszko's version reads,
15 it states that it will remain in effect, unless the
16 criminal proceeding is completed or I believe, unless
17 the Board terminates it.

18 To a certain extent, I think this is a
19 semantics issue. We're willing to concede that once
20 the criminal proceeding is completely over, that the
21 protective order can be lifted, but we would rather
22 have it -- so that we're all clear on whether or not
23 that's actually happened, we would rather have it
24 lifted by order of the Board versus terminating of its
25 own accord.

1 ADMIN. JUDGE McDADE: Okay, well, one of
2 the issues with regard to that is that once this
3 proceeding is terminated, this Board would lose
4 jurisdiction, so then it would be an issue as to how
5 this Board would be able, if at all, to enforce the
6 protective order once this proceeding was over.

7 Arguably, Mr. Siemaszko could agree to
8 return the documents and all copies to the NRC Staff
9 at the conclusion of this proceeding. They would, of
10 course, have the knowledge of what was contained in
11 those affidavits in their heads and would be able to
12 use that information, if it were relevant in preparing
13 his defense in a criminal matter.

14 Is that something that would be acceptable
15 to the NRC Staff?

16 MS. BROCK: Well, sort of, yes. I mean I
17 think if the order does not terminate of its own
18 accord, but stays in effect, that would be acceptable
19 to us. And if they return the affidavits to us at the
20 end, that would certainly be acceptable to us.

21 Part of the other point of contention
22 though was that we believe that this -- these
23 affidavits should only be used for the purposes of
24 this proceeding. And so if they're using it for the
25 criminal proceeding, obviously, I realize there's not

1 a total separation in your mind of what you know, but
2 that it's not given to criminal counsel.

3 ADMIN. JUDGE McDADE: Well, I mean that
4 poses some problems and without going into the details
5 of the affidavits themselves, I mean quite frankly,
6 they are sufficiently vague that I don't know that
7 they would be of particular value to Mr. Siemaszko's
8 criminal counsel. But at the same period of time, I'm
9 somewhat reluctant to establish something that would
10 prevent Mr. Siemaszko from defending himself period
11 and inhibiting him to have full discussions with his
12 counsel representing him in a criminal matter and
13 quite frankly, don't want to put the Board in a
14 position where we would be getting between Mr.
15 Siemaszko and the communications that he might have
16 with the counsel who is representing him in the
17 criminal matter.

18 Would it be sufficient to just simply say
19 the physical copy of the document would only be turned
20 over to Mr. Siemaszko and to his attorneys who are
21 representing him in this matter, but as far as
22 inhibiting communication between the civil attorneys
23 representing Mr. Siemaszko and the criminal attorneys
24 representing Mr. Siemaszko, that the Board simply
25 wouldn't get involved in that and the protective order

1 wouldn't touch that.

2 Would the NRC Staff have an issue with
3 that?

4 MS. BROCK: I'm sorry, Your Honor. I
5 think this puts us in a bit of a unique situation.
6 Normally, the type of protective order that we're
7 dealing with has safeguards information or proprietary
8 information and there it's always very clear, kind of
9 beyond dispute that it should only be used for the
10 instant proceeding and not for the others.

11 I appreciate the concern about showing it
12 to criminal counsel and that the Board doesn't want to
13 be in the middle of that conversation. I specifically
14 asked the Department of Justice this question, whether
15 they were willing for it to go to criminal counsel and
16 their answer was they felt that it should be used,
17 since it was written for this proceeding, it should
18 only be used for this proceeding.

19 And I think to the extent that the Board
20 doesn't want to get into the middle of communications
21 between Mr. Siemaszko and his criminal counsel, that
22 the affidavits could go solely to -- to start with, to
23 counsel to Mr. Siemaszko and if after they've reviewed
24 it, they feel like there's something there that they
25 need to raise an issue about, we could revisit it on

1 an issue by issue basis.

2 ADMIN. JUDGE McDADE: Okay, for Mr.
3 Siemaszko, if we were to allow these documents
4 physically to be furnished to you, to be read and to
5 be shared with Mr. Siemaszko, not to get ourselves
6 involved in any discussions that you might have, would
7 that satisfy your interest? Would that put you in an
8 untenable position or is that something that you could
9 work with?

10 MR. CLIFFORD: Your Honor, my name is John
11 Clifford, speaking for Mr. Siemaszko.

12 I think we could probably work with that,
13 but let's be clear about it, that Mr. Siemaszko has a
14 right to know what we know. We have a duty to inform
15 him of what we know in this proceeding. And he has a
16 right to communicate fully, the sixth amendment right,
17 to communicate fully with his counsel in the criminal
18 proceeding. So as far as -- it's one thing to -- can
19 we say that we won't turn over a copy of this
20 affidavit to Mr. Siemaszko's criminal attorney? I
21 think we can live with that, but he's going to know
22 the substance of it eventually if Mr. Siemaszko is
23 being a good client for his criminal attorney.

24 ADMIN. JUDGE McDADE: And that's what we
25 anticipate that you would have a physical copy of it,

1 that there would be nothing that inhibits you from
2 discussing it with Mr. Siemaszko. There would be
3 nothing prohibiting Mr. Siemaszko from discussing it
4 with the attorneys representing him criminally or
5 using it in your defense of the civil matter or the
6 attorney for Mr. Siemaszko in the criminal matter
7 using it in the defense. We're not going to get
8 involved in those kinds of discussions, so it's
9 physically the document would be restricted to counsel
10 for Mr. Siemaszko and Mr. Siemaszko.

11 MR. CLIFFORD: We can certainly live with
12 that.

13 ADMIN. JUDGE McDADE: If that's the case
14 and that's agreeable, what I would ask when we break
15 if you could make that available to counsel for Mr.
16 Siemaszko. Quite frankly, for the purposes of our
17 discussions right now, I don't anticipate that you all
18 will need that. I don't think there's a need for us
19 to delay our hearing here today while you read it.
20 What I would anticipate is we're going to hear
21 discussion about the issues from you now.

22 We would anticipate issuing an order some
23 time next week, if based on the content of those
24 affidavits, you felt that there was anything that you
25 needed to raise to us, we would ask you to just simply

1 notify us that something further would be coming in
2 writing and that we would hold off issuing an opinion
3 until that were received and considered. But
4 particularly with the Christmas holidays coming up, we
5 would want to put somewhat of a tight leash on that
6 and hopefully, if there were anything further to be
7 filed, to get it by the beginning of next week so that
8 I have no idea what your schedules are, Mr. Lochbaum's
9 schedules are, counsel to the Staff.

10 So whatever we get, hopefully, we could
11 get it by the beginning of the week by Monday at the
12 latest or if it needed to go beyond that, that you
13 would notify us of that.

14 MR. CLIFFORD: If we could get until
15 Tuesday on that, but your proposal is fine. Of
16 course, I must say that hearing -- reading between the
17 lines here, it sounds like we're going to get some
18 popcorn without salt or butter in this affidavit.

19 ADMIN. JUDGE McDADE: I'll let you make
20 that assessment once you've read it.

21 MR. CLIFFORD: If that's what it is, I'll
22 string it up and put it on the tree.

23 ADMIN. JUDGE McDADE: Okay.

24 MS. GARDE: Could we have until Tuesday,
25 Your Honor? We have a Monday hearing in Philadelphia.

1 ADMIN. JUDGE McDADE: That's fine. And I
2 would just simply ask then if you do it, if you just
3 email it so that we and the NRC Staff would have an
4 opportunity to review it and for us to take it into
5 consideration prior to issuing an order in this
6 matter.

7 And again, it may be after you look at it
8 you won't feel that anything further is needed and if
9 you could just simply notify the NRC Staff and the
10 Board to that effect.

11 MR. CLIFFORD: Fine, thank you.

12 ADMIN. JUDGE McDADE: Okay, I guess that
13 gets us into the substance of what we're here for
14 which is the Motion for Stay and at this particular
15 point in time I would have some questions for the NRC
16 Staff.

17 Specifically, as I read the case law, we
18 are called upon to do a balancing. The balancing is
19 the issue, Mr. Siemaszko's right to a speedy
20 resolution of the charges against him, against in this
21 instance, the Government's ability to go forward with
22 an investigation and if the investigation warranted
23 it, a criminal prosecution.

24 The first question I have has to do with
25 the impact that this proceeding has on Mr. Siemaszko

1 at this point in time. In all of the pleadings that
2 the NRC Staff has issued to the Board, they have made
3 the statement that he, Mr. Siemaszko, has not suffered
4 any deprivation of rights at this point because it is
5 not an immediately effective order and that therefore,
6 there is very little, if anything, sitting on his side
7 of the balance as opposed to what the Government's
8 position is where they argue that the ongoing
9 investigation significantly -- is a matter that
10 requires a delay.

11 In the order, it indicated, although on
12 the face of it it says this order is not immediately
13 effective, it nevertheless does say that in paragraph
14 4 if Mr. Siemaszko is working in the nuclear industry,
15 he must immediately cease and he must then notify both
16 his employer and the NRC Staff. In light of that, and
17 also in light of the fact that there was publicity,
18 specifically a press release issued by the NRC Staff
19 at the time that the suspension order was issued, what
20 I'd like the Government to discuss is specifically
21 one, given that language and the order, is this an
22 immediately effective order?

23 Would Mr. Siemaszko be able to work in the
24 nuclear industry now if he could find employment in
25 the industry? And even if it is not an immediately

1 effective order, isn't his inability to find
2 employment in the nuclear industry because of the
3 pendency of this proceeding, a matter that should be
4 weighed in favor of moving forward?

5 Ms. Brock?

6 MS. BROCK: To address your questions in
7 order, I do not believe paragraph 2 of the order can
8 be read to mean that he must immediately cease those
9 activities, although I understand how one might read
10 it that way.

11 ADMIN. JUDGE McDADE: But it says in hoc
12 verba he must immediately cease those activities.

13 MS. BROCK: Right, but the paragraph right
14 before says he's prohibited for five years from the
15 effective date of this order. And throughout it, it
16 refers to the effective date of the order as a sort of
17 drafting thing, we probably should have written if Mr.
18 Siemaszko is currently involved with another licensee
19 or other NRC-licensed activities on the effective date
20 of this order he must immediately cease these
21 activities.

22 But the order is not immediately
23 effective.

24 ADMIN. JUDGE LAM: Do you mean, Mr. Brock,
25 we should interpret what you are reading as to when

1 and if the order becomes effective?

2 MS. BROCK: He must immediately cease
3 those activities, yes.

4 ADMIN. JUDGE LAM: Okay.

5 ADMIN. JUDGE McDADE: So it's your
6 position that even though the order says he must
7 immediately cease those activities and notify. If, in
8 fact, he didn't cease those activities and he didn't
9 notify that he would not be in violation of the order?

10 MS. BROCK: Definitely not, because the
11 date -- the order --

12 ADMIN. JUDGE McDADE: It's not definitely.
13 I mean the express language of the order says that
14 that would be a violation. So what we're looking for
15 is your interpretation of it.

16 MS. BROCK: Well, the paragraph before
17 says Mr. Siemaszko is prohibited for five years from
18 the effective date of this order. And the --

19 ADMIN. JUDGE McDADE: But the preface of
20 that language is and I quote, "if Mr. Siemaszko is
21 currently involved." There's nothing prospective
22 about that. It says "if Mr. Siemaszko is currently
23 involved." And then it goes on to say "he must
24 immediately cease those activities."

25 MS. GARDE: Judge, where are you reading

1 from specifically?

2 ADMIN. JUDGE McDADE: It's paragraph 4.2.

3 MS. GARDE: Okay.

4 MS. BROCK: The paragraph right before it
5 states "Mr. Siemaszko is prohibited for five years
6 from the effective date of this order" and I believe
7 the cover letter to it states "the enclosed order
8 prohibits your involvement in all NRC-licensed
9 activities for a period of five years commencing 90
10 days from the effective date of this order."

11 And so I'm looking for more explanations
12 about -- and to the extent there's any question about
13 that, I would note the order itself has a provision
14 for the Director of the Office of Enforcement to relax
15 or rescind any of the above conditions upon
16 demonstration by Mr. Siemaszko for good cause.

17 And in explaining how you can ask for a
18 hearing, it offers 90 days. I guess the difference,
19 the significant difference between an immediately
20 effective order and a non-immediately effective order
21 is when we issue an immediately effective order it's
22 effective and he gets a later hearing, even without a
23 stay issue, whereas in the instant case, he's having
24 the right to an administrative review by this Board
25 prior to the effectiveness of this hearing.

1 And so if he was to gain employment in the
2 nuclear industry today, on the basis of this order,
3 the Commission would not be able to say that he was
4 violating the order.

5 ADMIN. JUDGE McDADE: That's the position
6 of the Staff.

7 MS. BROCK: That's the position of the
8 Enforcement Staff, yes.

9 ADMIN. JUDGE McDADE: Now with regard to
10 the other aspect of the issue, the fact that he has
11 this matter pending, he has this cloud hanging over
12 his head, doesn't it effectively, even if not de jure,
13 de facto, inhibit his ability to be employed in the
14 industry and therefore have an impact on him
15 financially?

16 MS. BROCK: Well, I think for that we have
17 to look at the fact that he wasn't -- look at multiple
18 things. One, he wasn't employed prior to us issuing
19 the order. Had, in fact, been terminated, has had a
20 fair amount of publicity regarding that of his own
21 initiation. And then I would also point to and I
22 believe I put this case -- I'll take a moment to find
23 it, in one of our earlier reply findings, but in terms
24 of a due process right, legal harm is a very defined
25 concept.

1 ADMIN. JUDGE McDADE: But aren't we
2 dealing here with due process which is an issue of
3 fundamental fairness, that a cloud has been put over
4 his head. The only opportunity he has to dissipate
5 this cloud is to have the hearing and to demonstrate
6 that the allegations are incorrect?

7 MS. BROCK: Well, in terms of -- but the
8 Supreme Court on the due process right has
9 specifically held that damage to a person's reputation
10 doesn't state a claim for relief under the fourteenth
11 amendment. That's Paul v. Davis, 424 U.S. 693 (1976).
12 And in that case, the Police Department had published
13 a flyer distributed to local area merchants of mugshot
14 photos of active shoplifters and Mr. Davis was on the
15 flyer. He had never been indicted. He hadn't -- his
16 guilt or innocence hadn't been resolved. After
17 circulation of the flyer, the charges against him were
18 dismissed.

19 And the Court held that false statements
20 did not make a deprivation of liberty within the
21 meaning of the due process clause and that damage to
22 reputation must be coupled with the alteration of a
23 legal status such as the loss of an employment
24 position.

25 In the instant case, the Government did

1 not cause the loss of his employment position and we
2 haven't altered his legal status. Therefore, I don't
3 think that his due process rights to a prompt hearing
4 have been triggered in this case.

5 ADMIN. JUDGE McDADE: Okay, that's the
6 position of the Staff.

7 MS. BROCK: That is the position of the
8 Staff.

9 ADMIN. JUDGE McDADE: For Mr. Siemaszko?

10 MS. GARDE: Your Honor, we agree. You
11 used the term "a cloud over his head." I'd say it's
12 more the sort of Damocles hanging over his head as he
13 waits for this to be resolved. And I don't think that
14 you can read that paragraph 4.2 to be modified by 4.1
15 and I think I mentioned this at the last hearing, that
16 I was contacted prior to this order being issued to
17 find out if he currently was employed within the
18 industry. I don't think that call was just an idle
19 conversation. I think this order was written knowing
20 that he was not currently employed in the industry.

21 And in the context of how this impacts
22 him, as a practical matter, he cannot go out and seek
23 employment in the industry with any expectation that
24 he would get such employment, if for no other reason
25 than when he fills out the information regarding his

1 status, he would have to fully disclose on any access
2 for security to a facility, he'd have to fully
3 disclose exactly what was going on here.

4 And so the practical reality of the
5 publicity, the fact that he isn't in a position to
6 apply without this being resolved, and is not able to
7 clear his name without a hearing, I think all argue in
8 the balancing test in his favor of getting this matter
9 resolved as quickly as possible.

10 ADMIN. JUDGE HAWKENS: Ms. Garde, I would
11 agree with you that the proceeding does have an
12 effect. It does put a cloud over his employability
13 prospects, but even if putting the proceeding aside,
14 would he have to, if he sought employment in the
15 nuclear industry, likely be required to disclosed that
16 he had been fired from his prior position?

17 MS. GARDE: He would have to --

18 ADMIN. JUDGE HAWKENS: And would that not
19 also put a cloud over his employability?

20 MS. GARDE: He would have to disclose
21 that. His access was not pulled, for cause, when he
22 was terminated. So people get fired in the industry
23 all the time. I think I would obviously advise him to
24 do full disclose about everything that's happening and
25 I frankly think since if he was exonerated which we

1 believe he would be in front of this hearing, and he
2 explained all of that, his reason for termination is
3 directly tied to exactly the reasons that are before
4 this hearing and I think that explains that and he's
5 seeking an opportunity to clear his name.

6 So he would say the full story and I think
7 being cleared would weigh in his favor, whether it
8 would weigh enough in his favor in this reduced
9 industry is too speculative for me to comment. I
10 can't come to you and say he has a job offer and
11 someone said oh, but now that I know who you are, you
12 know, I'm rescinding that job offer. If I had such
13 evidence, I would tell you. We don't have that.

14 ADMIN. JUDGE McDADE: I believe at the
15 last hearing, Mr. Lochbaum had indicated that a number
16 of people, I believe, two, had approached him looking
17 for people who were qualified to take positions in the
18 industry that Mr. Siemaszko would have met the
19 qualifications of those individuals, but yet given the
20 cloud over his head, that he would not be employable
21 by them.

22 Is that a correct recollection?

23 MR. LOCHBAUM: Judge McDade, if I could
24 also address Judge Hawken's point?

25 In my capacity at the Union of Concerned

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1 Scientists, I have worked with people who were fired
2 from nuclear power plants, get jobs back in the
3 nuclear industry. It happened a few years ago with
4 Harry Blank and Mark Samek at the Millstone Nuclear
5 Power Plant. They were fired. And as in Andrew
6 Siemaszko's case, their badges were pulled for cause,
7 they were hired back.

8 The same company that hired those two
9 individuals back, was a consulting firm that I had
10 worked for for 14 years. They called me earlier this
11 year looking for somebody for a job that Andrew
12 Siemaszko would have been perfectly suited for, but
13 they couldn't touch him, based on the NRC's action.
14 Not the fact that FirstEnergy fired him, but the NRC's
15 case in this one.

16 ADMIN. JUDGE HAWKENS: Why? Nothing in
17 this order, nothing in this proceeding bars his entry
18 back into the nuclear field?

19 MR. LOCHBAUM: Andrew Siemaszko is known -
20 - the reputation of Andrew Siemaszko has, a result of
21 NRC's actions, he's responsible for the bad things
22 that happened to Davis-Besse, so a consulting firm
23 really can't market that bad actor to a nuclear power
24 plant which are their clients. It's not a saleable
25 commodity right now.

1 The other company that contacted -- it was
2 an organization, wasn't a company -- was the Illinois
3 Emergency Management Agency. I've worked with them
4 over a number of years. They have State Resident
5 Inspectors at all the nuclear power plants in the
6 State of Illinois. One of those positions is open and
7 was vacated by a person with less experience and
8 capability than Andrew Siemaszko, but the Illinois
9 Emergency Management Agency cannot touch Andrew
10 Siemaszko because of the image that he has because of
11 this case. Again, not because he was fired from
12 FirstEnergy. They understand that that happens from
13 time to time. It was this NRC proceeding that just
14 made it a nonstarter.

15 ADMIN. JUDGE HAWKENS: So also the
16 circumstances of his firing were out of the ordinary.
17 We're trying -- you're trying to put this in a
18 category of a normal firing. Arguably, it's not,
19 against ordinary circumstances.

20 MR. LOCHBAUM: I also don't mean to imply
21 that if either of those organizations would have got
22 past that first start and brought him in for an
23 interview, that it wasn't guaranteed that he would
24 have been employed. I don't mean to make that at all.

25 ADMIN. JUDGE LAM: So Mr. Lochbaum, what

1 you are saying is this, even though the Staff order is
2 not immediately effective, the perception you have is
3 that it has materially damaged Mr. Siemaszko's
4 employment possibilities?

5 MR. LOCHBAUM: In those two cases that NRC
6 order basically took his name off the table. Those
7 companies couldn't even consider him for employment.

8 ADMIN. JUDGE LAM: Even though the order
9 is not immediately effective?

10 MR. LOCHBAUM: I think there was a
11 discussion here between lawyers as to whether it was
12 or it wasn't. The people out in the streets don't
13 really have that background and don't really
14 understand those subtleties, so the image on the
15 street is he's out of the industry regardless of what
16 the subtleties of the law says in that language.

17 MS. GARDE: Your Honor, if I could be
18 heard? He was terminated on September 24, 2002 and I
19 think relevant to your consideration, I'd like to just
20 read the last sentence of his termination letter in
21 which it says "at this juncture, the company has
22 determined that although your performance fell below
23 its expectations, you did not engage in deliberate
24 misconduct."

25 There are a lot of people fired from one

1 facility because their performance fell below whatever
2 the expectations were of that particular employer who
3 become re-employed and do very well in other places.
4 So it isn't -- I don't think it's the termination that
5 is impacting his ability to say yes, I was terminated
6 and I want to try again at this other job.

7 ADMIN. JUDGE HAWKENS: There have been
8 references in the various briefs we've received about
9 a pending Department of Labor proceeding.

10 MS. GARDE: Yes.

11 ADMIN. JUDGE HAWKENS: And how Mr.
12 Siemaszko moved to have that proceeding placed on hold
13 in light of the criminal investigation.

14 Can you provide some additional background
15 facts on that?

16 MS. GARDE: Sure. After Mr. Siemaszko was
17 terminated, we filed, our firm filed on his behalf a
18 Department of Labor case alleging that his termination
19 was in retaliation for his having raised and pushed
20 the issues regarding the need to clean the boric acid
21 off of the head of the reactor during 12-hour RFO, and
22 then his subsequent activities.

23 When and hopefully soon, we can present
24 our whole facts to you, I think you will see that it
25 was Andrew who actually got this issue even on the

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1 chart to do anything during 12-hour RFO. It wasn't
2 even on the schedule to do any cleaning on it. And we
3 believe that the story about why he was fired is a
4 little bit more complicated and demonstrates a
5 retaliatory animus toward him by management.

6 When we were involved in that proceeding
7 and we were -- we actually had both sides had
8 completed some discovery, Mr. Siemaszko's deposition
9 was noticed and shortly before his deposition
10 occurred, I might have the dates a little bit wrong on
11 this, we learned that he was a target of the federal
12 investigation. And so at that time, we engaged in
13 discussion with the Judge and asked the Judge if he
14 could postpone the proceeding until that matter was
15 resolved. We briefed it. FENOC opposed it, but
16 ultimately the Judge granted our request.

17 We notify the Judge every other month, I
18 believe, of what the status of the criminal proceeding
19 is and we will intend to pick up as soon as we are
20 able to in that proceeding.

21 Does that answer your question?

22 ADMIN. JUDGE HAWKENS: Yes. Maybe you can
23 explain to me why you saw to stay there and don't feel
24 a stay is necessary here?

25 MS. GARDE: Well, first of all, that was

1 right in the beginning of learning that he was a
2 target of a potential criminal investigation. And so
3 the timing of it put us in a bind. Frankly, it put
4 all parties in a bind because the FENOC witnesses that
5 we would have needed to depose, some of them weren't
6 exactly the same situation. And so we -- this all
7 happened 15 months ago.

8 If we get to the same crossroads in this
9 case, we're in a much different posture in the context
10 of understanding what the Justice's interest in him
11 are and what is the status of that. And I think I
12 alluded to that in my letter to you last week, that
13 although nothing is completely clear, based on what we
14 do know, the Justice Department has absolutely no
15 interest in the matters that are before you, that his
16 -- the only communications between Mr. Siemaszko and
17 the Justice Department have been regarding events in
18 November 2001. So nothing about 12 RFO is of interest
19 to them, based on our understanding.

20 So I don't see that anything you would do
21 in this hearing would have an impact on that. If we
22 face the question, I mean if the Staff asks a question
23 that fell within the scope of the Justice Department's
24 interest, we clearly would have to consult with his
25 criminal counsel. We'd clearly have to make a

1 decision. But those are not things before you.

2 ADMIN. JUDGE LAM: Ms. Garde, it puzzles
3 me about your legal strategy though. Isn't it right,
4 it seems to me, that the most expeditious way to
5 restore Mr. Siemaszko's employability is to prevail in
6 the Department of Labor, wrongful employment
7 termination administrative proceeding. If you are
8 willing to stay that proceeding, why would an
9 additional stay at this particular proceeding harm Mr.
10 Siemaszko's employment prospects?

11 MS. GARDE: You make a good point and we
12 have discussed that and frankly, and I'm sure it's
13 obvious that Mr. Siemaszko has no resources. So our
14 firm isn't in a position to represent Mr. Siemaszko
15 full-time in four or five different proceedings on a
16 pro bono basis.

17 And at the time that we made the original
18 decision, we didn't know near what we know now. We
19 have talked about reinstating the Department of Labor
20 proceeding and proceeding, but frankly, we want to
21 wait and see what happens here so we can give him our
22 best advice.

23 ADMIN. JUDGE McDADE: Let me just make
24 sure I understand it. This point is the NRC Staff has
25 moved for stay. You have aggressively opposed that

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1 stay. In the event that we were to deny the NRC
2 Staff's Motion and move forward, you understand that
3 it would be very unlikely that we would then grant Mr.
4 Siemaszko a stay in the proceeding.

5 MS. GARDE: Oh absolutely.

6 ADMIN. JUDGE McDADE: And you also
7 understand that in the event that we move forward, and
8 Mr. Siemaszko were deposed by the NRC Staff, if he
9 refused to answer under the fifth amendment ability to
10 refuse to answer if a truthful answer would tend to
11 incriminate him, in this administrative proceeding, we
12 could take an adverse inference against him based on
13 that?

14 MS. GARDE: We do understand that. In his
15 last deposition, actually the Judge, Mr. Clifford
16 presented him, and the Judge was there to rule on the
17 assertion of privilege, question by question. And if
18 we found ourselves in that position, we would just
19 have to see where those questions went. But yes, we
20 absolutely understand. You could draw an adverse
21 inference by his refusal to answer a question and
22 claim a fifth amendment.

23 ADMIN. JUDGE McDADE: A quick question for
24 Mr. Lochbaum. Based on your experience in the
25 industry, sir, the language in the order that I had

1 mentioned earlier that if Mr. Siemaszko is currently
2 involved in NRC-licensed activities, he must
3 immediately cease those activities. How would that be
4 interpreted in the industry by a potential employer?

5 MR. LOCHBAUM: If I was -- I work for a
6 consulting firm and if one of the people working for
7 me on a project had gotten that order, he would have
8 been out the door by the end of that day, that working
9 day or he would not have reported to work on the next
10 working day if it happened on the weekend. I couldn't
11 expose my company to the NRC's ire by seeming to be a
12 party to violating that order.

13 ADMIN. JUDGE McDADE: Before we move on to
14 something else, does the NRC Staff have anything in
15 response to statements made by counsel for Mr.
16 Siemaszko or by Union for Concerned Scientists?

17 MS. BROCK: Sure. And just for the
18 record, I asked Doug Starkey who is one of our
19 enforcement specialists to join me at the table so I
20 don't have to be running back to ask him questions.

21 A few things. One thing that Ms. Garde
22 commented on that he had lost his employment in
23 September of 2003?

24 MS. GARDE: September of 2002.

25 MS. BROCK: September of 2002 and I would

1 make the point that two and a half years passed from
2 that time to when we issued our order, during which
3 time he did not regain employment in the nuclear
4 industry. So to pin his current lack of employment on
5 this order, especially in light of the case law on
6 what due process is and what a legal deprivation is,
7 I think is not credible.

8 In terms of the order, the order has a
9 provision in it for relaxation. The order has
10 contacts of who to ask if there are questions about
11 the order. So I think to the extent that anyone read
12 the order and was unclear about whether he needed to
13 immediately cease activities, that could easily be
14 addressed by contacting the Office of Enforcement at
15 the NRC.

16 I guess that's all I have.

17 ADMIN. JUDGE LAM: Ms. Brock, before you -
18 - may I ask you, in your motion to extend the stay,
19 you again make the statement that there is an
20 allegation about witness intimidation. Would you be
21 able to tell us more than what you had said there?

22 MS. BROCK: The NRC received an allegation
23 of intimidation by a FENOC employee for testifying
24 before the Grand Jury.

25 ADMIN. JUDGE McDADE: Is there any tie

1 whatsoever, no matter how tenuous, between that and
2 Mr. Siemaszko?

3 MS. BROCK: To him personally?

4 ADMIN. JUDGE McDADE: Yes.

5 MS. BROCK: No, not that we're aware of.
6 It wasn't that he had personally retaliated, it was
7 the company.

8 The point of that and the reason why we
9 raised it is a lot of our concern has to do with the
10 public disclosure of documents.

11 ADMIN. JUDGE McDADE: One of the things
12 I'd like to get into at this point in time, in the
13 balancing, we have to make a determination as to
14 whether or not proceeding would interfere with the on-
15 going investigation or would compromise or otherwise
16 jeopardize a criminal prosecution that might arise
17 from it.

18 Could you explain in the Staff's view how
19 our proceeding at this point would interfere with an
20 on-going investigation? I mean the investigation has,
21 according to the original affidavit that was signed,
22 was filed in the open, has been under active
23 investigation since at least November of 2003, more
24 than two years. At this point in time, it would seem
25 that any witness who needed to be deposed has already

1 testified under oath. Any witness who wanted to be
2 interviewed by Government representatives has already
3 been interviewed. A memo of their statement has
4 already been made. Any documents that are needed have
5 already been subpoenaed, have already been analyzed by
6 the Government, certainly, they've had ample time to
7 do it.

8 This late in the game, how could our
9 moving forward interfere with the on-going
10 investigation?

11 MS. BROCK: I think as you're all very
12 aware, I don't have any personal knowledge of the
13 contents of the on-going criminal investigation, any
14 more than --

15 ADMIN. JUDGE McDADE: Than we do.

16 MS. BROCK: Right. Than you do, right.

17 ADMIN. JUDGE McDADE: But we have to do a
18 balancing and at this point on the balance, there's no
19 information. So I'm asking you to supply whatever
20 information you can to help us. Obviously, to me,
21 anyway, if the Government were able to represent and
22 demonstrate that our moving forward would interfere
23 with an on-going investigation, that would be a
24 significant factor in granting a stay.

25 Likewise, if you could demonstrate that

1 there was a reasonable possibility that moving forward
2 would jeopardize a criminal prosecution, that would be
3 a significant factor. And what I'm asking you to do
4 is just articulate how that would occur at this stage
5 of the game.

6 MS. BROCK: I don't think that our answer
7 is going to change a lot, but essentially, the
8 position of the Government is that the discovery
9 burdens between a criminal proceeding and a civil
10 proceeding are so different. And in a criminal
11 proceeding, a witness does not have the right to
12 access other witnesses. He doesn't have the right to
13 depositions. He doesn't have the right to cross
14 examine. He doesn't have the right to obtain the
15 witnesses' statements, especially prior to the
16 investigation being completed. And so that allowing
17 this proceeding to go forward upsets that delicate
18 balancing act.

19 And I would also point to what we
20 submitted in our affidavit, especially the affidavit
21 of September 8th, I think goes through all of the
22 factors that you're interested in and why the
23 Department of Justice believes that those would
24 interfere with the on-going investigation.

25 ADMIN. JUDGE McDADE: Well, in the dissent

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1 that I issued when you last requested a stay and
2 effectively this is the fourth stay that you've
3 requested, we granted a stay on May 25th, on July
4 22nd, and again on September 29th, so this would be
5 the fourth stay. I was not predisposed to grant any
6 stay the last time out and I believe in the dissent I
7 went through various factors that the Courts have
8 looked to as relevant and one of those is the ability
9 of an individual who gets the information to
10 successfully commit perjury and one of the issues that
11 I raised there is that I didn't see any venue at this
12 point where Mr. Siemaszko, even if he were predisposed
13 to commit perjury, would be able to.

14 Was I wrong? Is there any place, if he
15 wanted to commit perjury, he could commit perjury?

16 MS. BROCK: Well, I think in light of the
17 fact that the criminal investigation remains ongoing,
18 that would be a venue.

19 ADMIN. JUDGE McDADE: But he has no right
20 to testify anywhere in the criminal investigation. If
21 he says I want to go to the Grand Jury and tell them
22 my story, he has no right to do so, does he?

23 MS. BROCK: I'll take your word for that.
24 I have very little knowledge of criminal law, but I
25 think that you're right.

1 ADMIN. JUDGE McDADE: I mean didn't you
2 discuss it with Mr. Ballantine after the last opinion
3 was issued?

4 MS. BROCK: We discussed it.

5 ADMIN. JUDGE McDADE: And he didn't advise
6 you anything to the contrary, did he?

7 MS. BROCK: No. Not on that specific
8 issue, no.

9 ADMIN. JUDGE McDADE: What about any both
10 other than Mr. Siemaszko? Is there anybody other than
11 Mr. Siemaszko that you are concerned with, would be in
12 a position to successfully fabricate a story based on
13 the information that would be provided and again, at
14 least as I understand it, I mean first of all, the
15 scope of this proceeding has to do with activities
16 that occurred in April of 2000, having to do with the
17 preparation of work orders and that those work orders
18 contained inaccurate or incomplete information and
19 that that was prepared by Mr. Siemaszko, knowing that
20 the information was incomplete or inaccurate.

21 April of 2000 is beyond the statute of
22 limitations for any criminal matter, so whatever
23 matters are currently under investigation by the
24 Department of Justice, by definition, they must have
25 occurred prior -- after December 15, 2000.

1 MS. BROCK: Well, I think, Your Honor,
2 there are -- we have approximately 3,000 documents
3 prepared for disclosure under our 2.336 obligations.
4 A lot of those are witness interviews. And the
5 interviews encompass all events. They are not limited
6 just to April of 2000. It's the entire investigation.
7 And obviously, we've eliminated some documents that
8 have absolutely no relevance to this proceeding, but
9 so many of them are so intertwined.

10 And when you look at the -- I apologize
11 for my delays. I'm trying to be very careful about
12 not releasing any information that should not be
13 released.

14 I'll turn back to the public affidavit.
15 I think that one of the concerns is in the event there
16 are criminal indictments, the criminal defendants
17 would not have the ability to access all of those
18 documents prior to trial or they may get them in some
19 circumstances. But they would certainly have to be
20 indicted first and have to testify first and that
21 having a full access to those and specifically to
22 having the right to come in and ask more questions and
23 depose more witnesses would give them an unfair
24 advantage in the criminal prosecution where the
25 Government, in a criminal prosecution, can't go and

1 ask Mr. Siemaszko to testify or depose him.

2 I think that that --

3 ADMIN. JUDGE McDADE: But under the
4 circumstances Mr. Siemaszko is proposing here, you all
5 would get an opportunity to depose Mr. Siemaszko prior
6 to the time of his criminal trial. You wouldn't be
7 precluded from turning that information over to the
8 Department of Justice and if Mr. Siemaszko refused to
9 be deposed, claiming that a truthful answer could tend
10 to incriminate him, it would make your job very easy
11 because we could infer by that that a truthful answer
12 would demonstrate that he had committed the violations
13 that you allege and based on that alone, we could
14 determine that the order was justified and sustain it,
15 could we not?

16 MS. BROCK: Well, I think it would depend
17 somewhat on the circumstances and the exact questions,
18 but that might be one potential result. I hadn't
19 realized actually until this pre-hearing that Mr.
20 Siemaszko was willing to be deposed and have an
21 adverse inference taken against him in light of what
22 the difference of how the DOL proceeding was
23 conducted.

24 ADMIN. JUDGE McDADE: Okay, well, I don't
25 want to take up too much time, but I mean some of the

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1 other issues and specifically that I addressed in the
2 dissent last time, the case law indicated those
3 factors that we should take into consideration is
4 whether or not proceeding would one, allow someone to
5 successfully commit perjury; two, whether it would
6 facilitate the intimidation of witnesses.

7 And I had raised the issue that given the
8 fact that Mr. Siemaszko no longer works for the
9 company, doesn't supervise anybody who works for the
10 company, has limited financial resources, and doesn't
11 live at the time within a thousand miles of the
12 facility, that I didn't see that he had any capacity
13 to intimidate witnesses if he were to learn of their
14 identity and the nature of their testimony through our
15 proceeding.

16 What, if anything, Mr. Siemaszko could do
17 to interfere with either the investigation which
18 should be at its close or a subsequent prosecution?
19 Could you explain to me how he is in a position to
20 intimidate witnesses or change their testimony in this
21 case?

22 MS. BROCK: I think for that answer I will
23 again, I'm sorry I'm not able to be more forthcoming
24 in an open proceeding, but refer to the Justice
25 affidavit of September 8th.

1 ADMIN. JUDGE McDADE: I mean usually -- if
2 you look at the cases and the practice of white collar
3 criminal law, it's generally a situation where, for
4 example, an individual is employed at a firm and his
5 supervisor at the firm is the subject or target of the
6 investigation, and that individual is in a position to
7 take adverse action against the individual if he
8 learns that he's going to be a witness against him,
9 and it's view that that could inhibit the individual
10 from being forthcoming when he speaks either with
11 investigators or speaks to a Grand Jury.

12 Here, where Mr. Siemaszko doesn't have
13 access to any current employee of Davis-Besse, how is
14 he in a position to intimidate or change the testimony
15 of any witness?

16 MS. BROCK: I think I would again refer to
17 the September 8th affidavit and then also note that
18 again -- well, a couple of things I would note. One,
19 that the documents, when we release them are public
20 documents. Mr. Siemaszko is under no obligation to
21 not give them out to any witness he chooses.

22 Potentially, I mean, as I earlier stated,
23 we did receive an allegation of retaliation on the
24 part of the company, presumably, and that that's a
25 fear on the part of some of the witnesses who have

1 testified that that will -- the statements that they
2 made will come out. And that that's -- they're in an
3 easier position once the criminal investigation is
4 completed, because to the extent that they may still
5 be called to testify in that, it will be done.

6 And I guess the other thing that I would
7 add to that is Commission policy contemplates granting
8 -- this is one of the specific, a prime example of the
9 need to grant a delay is when continuation would
10 interfere with a pending criminal investigation or a
11 jeopardized prosecution. That's in our Federal
12 Register notice, 57 FR 20194 on when we can grant,
13 when you can grant stays.

14 ADMIN. JUDGE McDADE: Well, I mean that
15 Federal Register notice is also carried over in the
16 opinion of Oncology Services, and it really doesn't
17 say that, according to my reading. It says "the
18 Commission agrees with the thrust of the comments to
19 the effect that a grant of any delay in the proceeding
20 should take into consideration not only the interest
21 of the Government, but also the person affected by the
22 order. The presiding officer shall grant a delay only
23 if there is an overriding public interest in the
24 delay."

25 And then it goes on and it says "an

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1 example would be the temporary need to halt a
2 proceeding where the continuation would interview with
3 a pending criminal investigation or jeopardize the
4 prosecution."

5 And the question that I asked that sort of
6 led to this discussion is for you, if you can, to
7 persuade me that our going forward with this
8 proceeding, would either interfere with the pending
9 criminal investigation or jeopardize a prosecution
10 that might arise from it. And again, the factors
11 discussed in the case law, both NRC and also the case
12 law because parallel criminal and civil proceedings
13 aren't unique to NRC proceedings, is the ability to
14 successfully commit perjury, the ability to intimidate
15 witnesses, the ability to fabricate evidence, and as
16 I pointed out in my earlier dissent, that usually is
17 in a situation where one of the subjects or targets is
18 left in control of the company and control of the
19 company records or books and is in a position to alter
20 those books prior to the time that they are produced
21 either to the investigators or the Grand Jury. And
22 here, Mr. Siemaszko doesn't have access to any of the
23 records of Davis-Besse. He's not in a position to
24 fabricate any records and more than two years into an
25 active investigation, the Government would already

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1 have any records that it would need to make its case.

2 So the question again is -- and I don't
3 want to belabor this. If there's something that you
4 would like to bring to my attention that you think
5 would persuade me that moving forward would either
6 compromise the investigation, would interfere with the
7 investigation, or in the alternative, would jeopardize
8 a criminal prosecution, that this is an opportunity
9 for you to do so.

10 MS. BROCK: My response would be in terms
11 of jeopardizing the prosecution, that the burdens of
12 proof are very different in a criminal case than in a
13 civil case and the discovery rules are very different
14 in a criminal case than in a civil case.

15 And also, in terms of the oncology case
16 which you cited, where it discusses looking at the due
17 -- balancing the due process rights of Mr. Siemaszko
18 against the Government's interest in protecting the
19 criminal prosecution, I would again reiterate that in
20 our view, Mr. Siemaszko doesn't have a due process
21 right triggered because of the lack of immediate
22 effectiveness.

23 That's probably I have for that.

24 ADMIN. JUDGE McDADE: But with regard to
25 the different discovery, if, in fact, an indictment is

1 returned against Mr. Siemaszko, by the time that he
2 would be called on to testify at trial, he would have
3 already received all the material under rule 16,
4 Federal Rules of Criminal Procedure; already received
5 the materials required by Brady v. Maryland; already
6 received the materials required by Giglio v. the
7 United States; and also received all of the materials
8 required under the Jencks Act; and would have actually
9 heard the witnesses testify.

10 So my question is, is there something that
11 you can present to me that would indicate that by
12 moving forward, that prosecution would be jeopardized?

13 MS. BROCK: What I would add, he would
14 not, in a criminal proceeding, have the right to ask
15 interrogatories of the investigators, which we will in
16 this proceeding. He will not have the right to depose
17 investigators or other potential witnesses, which he
18 will in this proceeding. And he will not have the
19 right to ask for more documents, other than those that
20 you've mentioned that have to be disclosed, which he
21 will in this proceeding.

22 ADMIN. JUDGE McDADE: For Mr. Siemaszko,
23 anything further on this issue?

24 MS. GARDE: Well, Your Honor, I think
25 these issues have been fully briefed. I didn't hear

1 anything new.

2 There are two points I want to make sure
3 is clear. The Staff made a number of references to
4 the 9/8 affidavit which we have not seen. And I hope
5 to see soon. I just want to make sure that there's
6 nothing in that 9/8 affidavit that contradicts her
7 earlier statements that there is no indication that
8 Mr. Siemaszko has ever attempted to intimidate or
9 interfere with any witness or any part of the
10 proceeding, which I think she did say. But there was
11 a continued reference to the 9/8 affidavit and I just
12 want to make sure that I completely understand her
13 argument.

14 ADMIN. JUDGE McDADE: And obviously, from
15 my previous dissent, I found nothing in the 9/8
16 affidavit that would warrant a further delay. My
17 colleagues disagreed.

18 When you have an opportunity to read it,
19 again, you will have an opportunity to submit anything
20 further that you think needs to be elaborated from
21 that and we will take that into consideration.

22 MS. GARDE: Right, I guess the only other
23 point is that as the Board has noted and as we have
24 argued in a previous conference call, Mr. Siemaszko
25 doesn't -- this is not a civil proceeding he

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1 initiated. He is in this position because the Staff
2 put him in this position and is attempting to defend
3 himself in that context. And he certainly is entitled
4 to the discovery that she has described for very sound
5 reasons.

6 I think that if, in fact, the criminal
7 proceeding is not about the events during 12 RFO, that
8 any argument that ever could have been made that one
9 will interfere with the other really comes down to a
10 matter of convenience of the Staff not turning over
11 materials that, as I heard or described, were
12 intertwined with the two issues. And that I don't
13 think you'll even get there. There's a year and a
14 half between the events that you're looking at and the
15 events that may or may not ever amount to an
16 indictment against Mr. Siemaszko which is not at all
17 clear.

18 ADMIN. JUDGE McDADE: Okay, Mr. Lochbaum,
19 do you have anything further to add on this issue?

20 MR. LOCHBAUM: No, Your Honor.

21 ADMIN. JUDGE LAM: Before Mr. Lochbaum
22 moves away, I'd like to hear your response, Ms. Block
23 to what Ms. Garde just said. Is this an issue of
24 convenience here, that you refuse to turn over
25 material?

1 MS. BROCK: No.

2 ADMIN. JUDGE LAM: Is this such a burden
3 to the Staff to turn over material?

4 MS. BROCK: it's not an issue of
5 convenience. And I think as Mr. -- in the original
6 affidavit that was publicly filed, I'm going to turn
7 to it. I believe that one of the statements that Mr.
8 Ballantine states there that the truthfulness of
9 FENOC's bulletin response is an issued referred to the
10 Department of Justice by the Office of Investigations.

11 The bulletin responses in the fall of 2001
12 are regarding the inspection of the reactor vessel
13 heads. The inspections in 2000 and 1988 and 1996.
14 Those responses are all public documents. I mean they
15 came in on the public docket. And the issue there is
16 whether -- how truthful they were.

17 So what happened during refueling outage
18 12 and the cleaning of the reactor vessel head is at
19 the heart of the bulletin responses. And I say that
20 out of a knowledge of the bulleting responses which
21 are public documents and including in our order in
22 April, we based the order on the incomplete and
23 inaccurate statements in April of 2000 and then state
24 in there that had we known, we would have taken
25 immediate regulatory action and certainly one of our

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1 times to know what had happened is April of 2000 was
2 when they submitted those documents to us in the fall
3 of 2001. So that's why it's not an issue of
4 convenience. That's why those issues are so
5 inextricably linked.

6 ADMIN. JUDGE LAM: So the materials are
7 there and you have no hesitation to turn them over if
8 that's what the Board orders or if that's the right
9 thing to do.

10 MS. BROCK: I'm not following your
11 question, I'm sorry.

12 ADMIN. JUDGE LAM: Well, because Ms. Garde
13 raised the issue of well, you are asking for delays.
14 You don't want to enter into discovery. You don't
15 want to turn over material. And the statement was
16 that it's a matter of convenience for the Staff.

17 My question has to be while the Staff has
18 its own enforcement responsibility and obligations,
19 the issue of convenience should not be on your agenda?

20 MS. BROCK: We've had all of the documents
21 -- we've been anticipating going forward with this
22 proceeding. I was caught off guard, as the Board and
23 the parties, by asking for another delay. We have all
24 of our documents essentially prepared. We have them
25 indexed. We still need to copy the CDs, but we could

1 -- in saying that, now if we were told to attempt to
2 redact them so that they only referred to the
3 refueling outage 12, we would need --

4 ADMIN. JUDGE LAM: It's a separate matter.

5 MS. BROCK: And I guess specifically since
6 we don't have knowledge of the criminal investigation
7 and what exactly they're looking at, we would have to
8 go to Justice for them to say what can we give out.

9 ADMIN. JUDGE HAWKENS: Are you involved at
10 all, do you participate with Mr. Ballantine to
11 determining whether, going forward with this
12 proceeding, would, in fact, compromise or jeopardize
13 the investigation or the criminal prosecution?

14 Or do you defer -- does he come to you and
15 tell you --

16 MS. BROCK: We defer to them on that.

17 ADMIN. JUDGE HAWKENS: -- that you should
18 seek the stay.

19 MS. BROCK: We have a Memorandum of
20 Understanding with the Department of Justice that
21 states that the NRC Staff will seek a stay at the
22 request of the Department of Justice.

23 ADMIN. JUDGE HAWKENS: How comfortable are
24 you with Mr. Ballantine's representation that it's
25 likely that by February 1st, the investigative phase

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1 of this will be over?

2 MS. BROCK: I think that that's true. In
3 his affidavit of December 6th, I guess it was, the
4 most recent one we filed, he states pretty
5 specifically.

6 ADMIN. JUDGE HAWKENS: I thought he stated
7 pretty specifically two times before and I hope I'm
8 not disappointed again.

9 MS. BROCK: Me too. I think they'll be
10 done. I think there's a lot of reasons why it will be
11 done and I think that there's a pretty specific plan
12 now.

13 ADMIN. JUDGE HAWKENS: Let me ask you
14 this. We discussed this at the last pre-hearing
15 conference. Let's assume that Mr. Siemaszko is
16 indicted. Is it likely that Mr. Ballantine will ask
17 you to seek another stay here?

18 MS. BROCK: Yes, and they specifically --
19 I intended to put that in my most recent motion. I
20 may have put it in a footnote, to put you on notice
21 that in light of an indictment, that they would
22 anticipate seeking another stay of this proceeding.

23 I would add though that if he is, in fact,
24 indicted, obviously, that shifts to the extent that he
25 is under a cloud from our not yet effective order, as

1 compared to a criminal indictment, I think that would
2 change that.

3 ADMIN. JUDGE HAWKENS: And let's assume
4 again, we didn't discuss this at the last prehearing
5 conference and my recollection is that you said if he
6 were not indicted you were sure that you could work
7 out an arrangement with Ms. Garde to release the
8 necessary material and go forward. Is it still your
9 position that you think you could do that?

10 MS. BROCK: Yes. I don't anticipate any
11 problems along those lines.

12 ADMIN. JUDGE HAWKENS: What type of
13 protection though would you seek to impose on the
14 discovery material or would you just put it in the
15 public record at that point?

16 MS. BROCK: Uh --

17 ADMIN. JUDGE HAWKENS: Because I would
18 anticipate Ms. Garde saying look, you can't say we're
19 willing to go forward if you put restrictions on my
20 use of the discovery material.

21 MS. BROCK: I don't anticipate that -- the
22 only reason why these documents need any protection at
23 all is due to the pendency of the criminal proceeding.
24 While if no indictments are returned, the criminal
25 proceeding will be over.

1 ADMIN. JUDGE HAWKENS: Right. I'm not
2 saying no indictments will be returned. I'm saying no
3 indictment is returned against Mr. Siemaszko.

4 MS. BROCK: But is against others.

5 ADMIN. JUDGE HAWKENS: May be. I'm not
6 concerned about them.

7 MS. BROCK: Yes. I guess that's not a --
8 I think that I can negotiate that one. I don't think
9 we'll have any -- we wouldn't be trying to restrict
10 the documents more than is necessary in the event that
11 that happens.

12 ADMIN. JUDGE LAM: Now this is a new Grand
13 Jury, Ms. Brock. The last one lasted two years. How
14 do you think this one will finish in 55 days?

15 MS. BROCK: I think there's -- the Board
16 may know this better than I do actually, but there's
17 different types of Grand Juries and this other -- the
18 Grand Jury that last -- was an investigating Grand
19 Jury. And if I refer to the December --

20 ADMIN. JUDGE McDADE: Well, there are
21 basically two kinds of Grand Juries, either a general
22 Grand Jury or a special Grand Jury. I'm making an
23 assumption, based on the way this matter has gone
24 forward, I have no information whatsoever that this is
25 a special Grand Jury, a special Grand Jury is normally

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1 empaneled for a term of 18 months. And the statute
2 and Rule 6(g) of the Federal Rules of Criminal
3 Procedure allow for that special Grand Jury to be
4 extended for a period of up to an additional six
5 months.

6 There are other Grand Juries that usually
7 are looking into organized crime type situations that
8 can be empaneled for a period of up to 36 months. But
9 from Judge Lam's question, we start with the premise
10 that this was actively investigated by a Grand Jury
11 beginning in November of 2003, that if it were a
12 special Grand Jury, the longer Grand Jury, it would
13 have a term of 18 months, subject to extension for 6
14 months, which would bring it to November of 2005. And
15 we're past that.

16 So therefore, it would appear just from
17 the rules that it must have been referred to a
18 different Grand Jury for investigation or for the
19 return of an indictment. And anticipate that that's
20 the current situation, but we don't -- there's no
21 specific information publicly available at this point
22 other than that, that we just surmise from it.

23 But in any event, questions that I have
24 and basically they're raised by Oncology Services, I
25 view this not as a request for a 55-day stay, but

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1 rather for 10-month stay, again, that this is
2 piggybacked on the stays that we granted on three
3 separate occasions, the most recently being in
4 September, that the order and the request for hearing
5 was made back in April. So this will basically take
6 us to 10 months of delay. And then to me, the equally
7 disturbing is at least as we sit here right now, based
8 on the representations of the NRC Staff, is that the
9 actions occurred in April of 2000.

10 We are now more than five years later. It
11 is reasonable that the Department of Justice might
12 take into consideration not only the underlying
13 actions, but also actions that would, for lack of a
14 better phrase, try to keep the underlying actions from
15 coming to the attention of regulatory authorities,
16 that most white collar criminal cases would involve a
17 conspiracy charge that would include the period of the
18 cover up. So that we would be within that period of
19 time.

20 But at this point in time, more than five
21 years after the incident, Mr. Siemaszko is still a
22 target of the investigation or at least the subject of
23 the investigation. It is reasonable to assume, based
24 on that, that there is a real possibility that when
25 the investigation concludes, he will be a defendant.

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1 If that occurs, it is unlikely that this matter would
2 come to trial in 2006. We would probably be looking
3 to 2007 by the time all the motions were decided and
4 again, it would be a function of how many other
5 defendants are named with him.

6 So what we're really looking for is -- I
7 mean, sort of being and this is going to sound
8 pejorative and I don't mean it to be, nickel and dimed
9 to death that we're asked for 120-day stay, a 90-day
10 stay, a 55-day stay and ultimately with all of the
11 stays we wind up delaying this matter for years. And
12 Mr. Siemaszko has this cloud over his head for years.
13 Aren't we going to be asked, I mean reasonably, if
14 this 55-day stay is granted, aren't we going to be
15 asked for another indefinite stay until the criminal
16 matter is resolved?

17 MS. BROCK: I would like to say too, I
18 mean, the Staff does apologize for the multiple
19 requests. We certainly didn't anticipate that. Each
20 of them has been Department of Justice's best estimate
21 of how much time they would need.

22 ADMIN. JUDGE McDADE: And I understand you
23 have to rely on them for the information and --

24 MS. BROCK: And so I also would have
25 rather come in with one stay of 10 months than being

1 here multiple times.

2 In terms of the -- my understanding of the
3 last time I spoke with Justice was that they would
4 like another stay in the event that there is an
5 indictment. They have not made statements about
6 whether or not they think that that's likely as
7 obviously that would be inappropriate.

8 However, they and us have been assuming
9 that we would -- that the same thing would happen in
10 this proceeding that did with the Department of Labor
11 proceeding, that once we started that they would go to
12 stay if we had tried to depose or they would take the
13 fifth, that Mr. Siemaszko would take the fifth and not
14 want an adverse inference drawn.

15 In terms of whether that once an
16 indictment is issued, they would still want to stay in
17 light of that, I would like to consult with them
18 again, because that's a different piece of
19 information, but I don't think it changes wanting a
20 stay until the indictments are issued because they
21 don't have to release any documents until after the
22 indictments are issued and that is a concern.

23 ADMIN. JUDGE McDADE: Okay, the situation
24 at least for me to run down the possibilities are at
25 the end of the 55-day stay, the investigation

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1 continues. No indictments have been handed up. The
2 investigation continues, in which case you would be
3 moving for an additional stay. An indictment is
4 returned which includes Mr. Siemaszko as a defendant
5 in which case an additional stay would be requested.
6 An indictment is returned in which Mr. Siemaszko is
7 not a defendant and what you're saying is even though
8 Mr. Siemaszko would be getting those documents, and
9 would be able, arguably, to discuss his situation with
10 other individuals who may or may not be a defendant in
11 the case because the people who are defendants might
12 well be witnesses, that he would want to call in his
13 case, that even if that were to occur, you would not
14 be asking for an additional stay, unless Mr. Siemaszko
15 was indicted and then, of course, in the event the
16 investigation concludes with nobody being indicted,
17 you would not be moving for a stay.

18 Is that a correct summary of what the
19 Staff's position is?

20 MS. BROCK: Yes. The only thing I would
21 add to it is, we do anticipate the investigation being
22 completed by the first of February. And I think --
23 and I know, I can understand your hesitation to accept
24 that, but I think referring to the December 6th
25 affidavit, it has a fairly specific schedule.

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1 ADMIN. JUDGE McDADE: For Mr. Siemaszko,
2 anything further?

3 MS. GARDE: Your Honor, it just occurs to
4 me that the Staff, and I'd like to put this on the
5 table, should consider withdrawing the action that
6 they brought against Mr. Siemaszko in connection with
7 the issues in 12 RFO and following the lead of the
8 Justice Department on the November 2001 issues. I
9 don't see how we find ourselves really in any
10 different situation within those three examples that
11 you just gave no matter what happens in the next 55
12 days.

13 I mean I think you've laid out what the
14 options are and that the more logical approach to this
15 and one we may consider filing a motion on is the
16 Staff should reconsider what they did with respect to
17 the April 2000 actions. I don't see how they're going
18 to ever get to the point where they can prosecute
19 those issues in front of you without -- unless the
20 whole criminal investigation just collapses and nobody
21 gets indicted. So that the Justice Department just
22 hands the whole thing back to the Staff and say, these
23 are your problems NRC, you deal with them.

24 ADMIN. JUDGE HAWKENS: Or she said, unless
25 Mr. Siemaszko was not indicted, in which case it would

1 go forward as well.

2 MS. GARDE: Right, yes.

3 ADMIN. JUDGE HAWKENS: Ms. Garde, let me
4 make sure I understood your position. If an
5 indictment is returned against your client, he has no
6 objection to going forward with this proceeding?

7 MS. GARDE: Well, I can't speak on behalf
8 of his criminal lawyer, who may have different advice,
9 but I don't have any objection to that because it is
10 -- they're very separate actions.

11 ADMIN. JUDGE HAWKENS: But you can't
12 answer that question?

13 MS. GARDE: I can't answer that question -
14 -

15 ADMIN. JUDGE HAWKENS: On behalf of your
16 client?

17 MS. GARDE: On his behalf, without talking
18 to his criminal counsel.

19 ADMIN. JUDGE McDADE: But you understand
20 even if you did have an objection at that point, we
21 might not sustain the objection and decide to move
22 forward anyway?

23 MS. GARDE: I do understand that.

24 ADMIN. JUDGE McDADE: Mr. Lochbaum, do you
25 have anything further that we should consider?

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1 MR. LOCHBAUM: No thank you, Your Honor.

2 ADMIN. JUDGE HAWKENS: I have one further
3 question for Mr. Lochbaum. Now that you understand
4 the proper interpretation of the order, will that
5 remove and if he seeks your assistance in getting
6 employment in the nuclear industry, would that
7 diminish the cloud? I understand the argument that it
8 still does, in fact, impair his employability, but
9 does it diminish it somewhat from your perspective?

10 MR. LOCHBAUM: Not to my understanding.
11 If a position came open this afternoon or tomorrow or
12 somebody called me and said I'm looking for a
13 candidate and Andrew's background filled it, I would
14 still put Andrew forward for that position. I'd let
15 that other entity make a decision whether they wanted
16 to contact him or not. I think, based on what I know
17 about Andrew, I think he's a good guy, would do a good
18 job. So I would continue to make that recommendation.

19 It's really on the interpretation of
20 whoever I refer him to, whether they want to contact
21 him or not. The only two that have contacted me to
22 date where I've made that referral, didn't want to
23 proceed further because of the cloud. I don't know
24 what the next one might do or not.

25 ADMIN. JUDGE McDADE: My question was the

1 cloud, because of the misunderstanding on how the
2 enforcement order should be interpreted or was now
3 that you understand the proper interpretation, would
4 that diminish the cloud?

5 MR. LOCHBAUM: In my view it doesn't.

6 ADMIN. JUDGE McDADE: Thank you.

7 MR. LOCHBAUM: thank you.

8 ADMIN. JUDGE McDADE: Judge Lam, anything
9 further?

10 ADMIN. JUDGE LAM: If I may follow up? I
11 think, Mr. Lochbaum, I think the proper interpretation
12 of that order would be what the Staff has put forward,
13 that this order is not immediately effective. If Mr.
14 Siemaszko is employed today, he has no duty, he has no
15 obligation to inform anybody. I think that may help
16 him a little bit.

17 MS. GARDE: Your Honor, I really would
18 like to ask for a clarification of that from the Staff
19 in writing, because that certainly is contrary to the
20 language in the order.

21 ADMIN. JUDGE HAWKENS: It seems like a
22 fair request and I would hope the counsel would agree
23 to that.

24 MS. GARDE: Thank you.

25 MS. BROCK: I don't anticipate any problem

1 with that.

2 ADMIN. JUDGE McDADE: Okay, I think that
3 basically wraps up everything that we need to do
4 today, that today, the Staff will furnish those
5 declarations, affidavits to Mr. Siemaszko's attorneys.
6 I don't think we need to issue a separate protective
7 order, that we have a verbatim transcript here and
8 it's very clear that those are not to be disseminated
9 to anyone other than counsel for Mr. Siemaszko in this
10 proceeding and Mr. Siemaszko. They're not to be
11 physically transferred to anybody else.

12 At the concluding of this proceeding, they
13 will at the request of the Staff either be destroyed
14 or returned to the Staff and any copies would be
15 destroyed. If Mr. Siemaszko wishes to make other uses
16 of it or disseminate it for other purposes, he should
17 come to the Board and make a request for that, that
18 Mr. Siemaszko, if he believes he has anything further
19 to add, having read those would submit that by close
20 of business on Tuesday next so that we could take it
21 into consideration in drafting our order. And we
22 would then issue an order if we would anticipate
23 issuing an order some time next week that will discuss
24 all of the relevant issues.

25 Let me just ask, given the fact that the

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1 holidays are upon us, and people generally take leave,
2 one of the issues has to do with if we were to issue
3 an order and if one or any of the parties wish to
4 appeal it, we would have to make a decision as to
5 whether our order would be immediately effective and
6 whether or not a reasonable period of time between the
7 date of the order and the effect of the order to allow
8 parties to appeal it.

9 What's the position of the Staff? Are you
10 all going to be around? Are you going to be -- if we
11 were to put a relatively short turnaround time on it,
12 would you be able to make a decision with regard to
13 any appeal and file that? Or would you need -- and
14 give me a period of time. Would you need a week, two
15 weeks, three weeks?

16 MS. BROCK: To appeal it?

17 ADMIN. JUDGE McDADE: Yes. Assume we made
18 a decision adverse to you. I assume if we make it in
19 your favor, you're not going to appeal it. You'll
20 decide that we've done correctly. But if there's an
21 adverse order to you, would you need two weeks, three
22 weeks?

23 MS. BROCK: We would seek a stay of the
24 effectiveness of the order which could be granted
25 either by you or by the Commission. And if you didn't

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1 wish to grant that stay, I think we wouldn't need more
2 than two days to seek that immediate housekeeping stay
3 and I think there's a provision for once you get that
4 type of stay which is actually, you've granted it
5 several times, to seek a more further review.

6 I guess what I would ask is if you make a
7 decision adverse to us, if you would stay it pending
8 review by the Commission.

9 ADMIN. JUDGE McDADE: Indefinitely?

10 MS. BROCK: You can put a filing deadline
11 on us that we have to file, that if we file within --

12 ADMIN. JUDGE McDADE: And that's what I'm
13 asking you, is how much time?

14 MS. BROCK: Do we need to file? Five
15 days.

16 ADMIN. JUDGE McDADE: Okay, from the
17 standpoint of Mr. Siemaszko, assuming that we were to
18 rule adversely to you, well first, yes, adversely to
19 you, how much time would you be looking for? I assume
20 you'd be prepared to go forward relatively quickly?

21 MS. GARDE: Well, we would be prepared to
22 go forward relatively quickly. We just have to see
23 what your order says in the context of over the
24 holidays. I think most of our office will be gone, so
25 the end of the first week of January which I think is

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1 like the fourth or the fifth would -- we would greatly
2 appreciate.

3 ADMIN. JUDGE McDADE: And Mr. Lochbaum,
4 with your schedule?

5 MR. LOCHBAUM: I could do it within five
6 days like the NRC Staff.

7 ADMIN. JUDGE McDADE: Okay. Judge
8 Hawkens, anything further?

9 ADMIN. JUDGE HAWKENS: No thank you.

10 ADMIN. JUDGE McDADE: Judge Lam?

11 ADMIN. JUDGE McDADE: Do any of the
12 parties have anything further?

13 MS. BROCK: The only thing further I have
14 is on this issue of the affidavits and we're quite
15 comfortable giving them to Ms. Garde. I'm a little
16 unclear, I guess, that there's no protective order
17 that's just a bit of an unusual procedure for me. And
18 specifically that then that would mean that there was
19 no -- nondisclosure. We have the protective order
20 prepared.

21 MS. GARDE: But we don't agree with it.
22 We do not agree with the protective order.

23 MS. BROCK: And I guess that's what
24 troubles me a little bit about -- that if there's
25 already a disagreement about where we stand on the

1 protective order that an oral protective order --

2 ADMIN. JUDGE McDADE: We're under the
3 order of the Board. I mean as I understand it,
4 there's a proposed protective order by the Staff.
5 There's a proposed protective order by Mr. Siemaszko
6 that I just stated what the terms of this protective
7 order are and it is binding on Mr. Siemaszko that
8 sanctions would be taken against Mr. Siemaszko if that
9 protective order were not filed.

10 What I want to do is to facilitate them
11 getting the documents as quickly as possible so that
12 they can respond as quickly as possible so that you
13 all aren't sitting here on Christmas Eve responding to
14 what they have.

15 ADMIN. JUDGE HAWKENS: Or more importantly
16 that we're sitting here Christmas Eve.

17 (Laughter.)

18 ADMIN. JUDGE McDADE: Or Christmas Day
19 reading your Christmas Eve response.

20 I think it's clear. There's a transcript.
21 You're both are going to get the transcript as to what
22 the terms of that protective order are. Now the order
23 that the Board issued. My colleagues have agreed with
24 it. If you all have any objection to the terms of the
25 protective order, as I articulated it, now is the time

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1 to mention it so I can modify it if you believe that's
2 appropriate.

3 MS. BROCK: I guess I'm troubled by it
4 being an oral order, whether it would be, when the
5 jurisdiction of this Board ends, who would have the
6 authority to enforce it. It's unclear to me and I'm
7 obvious -- this isn't something I earlier anticipated
8 looking at 2.202 which is what our orders are issued
9 under, if we would have any enforceability of the
10 order.

11 ADMIN. JUDGE McDADE: It would be the same
12 as you would ordinarily have, once the proceeding is
13 over, our jurisdiction would terminate, if they did
14 not do what they are required to do under the order
15 which is to return the documents to you or at your
16 request, destroy them. They would be in violation of
17 the order and it would be incumbent upon this Board to
18 notify their bar associations that a protective order
19 was issued and they violated the protective order and
20 to take what actions their bar disciplinary counsel
21 deemed appropriate. But I don't know what other
22 authority that we would have, no matter what we put in
23 a protective order to do. If there's something else
24 that you would suggest, suggest it.

25 MS. BROCK: I guess, normally, in this

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1 type of issue when we've been concerned about a
2 protective order being violated after the Board
3 jurisdiction has ceased, it's an order of the
4 Commission in writing and the Staff investigates it
5 and takes enforcement action pursuant to its normal
6 enforcement process.

7 ADMIN. JUDGE McDADE: This will be in
8 writing. There's someone right there, writing it
9 down. It's already written.

10 MS. GARDE: I think, Your Honor --

11 ADMIN. JUDGE McDADE: Do you insist on a
12 more formal order or do you agree --

13 MS. GARDE: No, I completely understand
14 what you've instructed us and I have no intention of
15 you referring anything to my bar association for
16 violating. So I have no questions. I completely
17 understand the terms. We accept it and we will return
18 or destroy it as directed by the Staff at the close of
19 the pendency of the proceeding.

20 The only clarification you didn't state,
21 when you restated the terms, I just want to make sure,
22 that there is an understanding that we will orally --
23 well, I don't know if we will, but Mr. Siemaszko has
24 a right to orally talk to his criminal counsel about
25 what he learns and there's no interference in that

1 communication by the Board and that's understand by
2 the Board.

3 ADMIN. JUDGE McDADE: Correct, that we are
4 not inhibiting his ability to have full, open and
5 frank discussions with his attorney who is
6 representing him in the criminal investigation. We
7 are not going to get involved with that.

8 However, again, with regard to the
9 physical document itself, that document is going to
10 remain with you.

11 MS. GARDE: Correct.

12 ADMIN. JUDGE McDADE: But again, we're not
13 going to become involved in what Mr. Siemaszko has to
14 say to his attorney representing him in a criminal
15 matter.

16 MS. GARDE: That is how I understood it.
17 We have no problem with complying with it and we
18 intend to fully comply with it.

19 ADMIN. JUDGE LAM: I think the NRC Staff's
20 concern is misplaced. Before this Board is terminated
21 all protected material would have been disposed of, so
22 why would you be concerned about how it's going to be
23 disposed of?

24 MS. BROCK: I guess we're concerned about
25 the information contained in it, that if that's

1 disclosed after the -- well, that we're concerned
2 about the information.

3 I'm a little unclear still on whether
4 you're granting Mr. Siemaszko access to it.

5 ADMIN. JUDGE McDADE: Yes, we are. We are
6 granting Mr. Siemaszko access to it. That he can read
7 it, otherwise how can he discuss intelligently with
8 his attorneys and how can they intelligently represent
9 him?

10 So yes, we are giving Mr. Siemaszko access
11 to it. If Mr. Siemaszko were to inappropriately
12 disseminate that, again, Mr. Siemaszko still has a
13 matter pending before this Board and it would be
14 viewed quite seriously by the Board. So under those
15 circumstances, I can't imagine that Mr. Siemaszko
16 would want to make his position in front of the Board
17 more difficult than it currently is.

18 MS. BROCK: And I guess, I'm sorry to
19 belabor this --

20 ADMIN. JUDGE McDADE: To just sort of
21 break this off, at this point in time, if there is any
22 further modification you want in the protective order,
23 if you can just write that up in a brief motion,
24 perhaps submit it by Tuesday as well, with just -- by
25 that time you'll have a copy of this transcript.

1 You'll be able to look at it. If you feel that a
2 modification to the protective order that was issued
3 here today is in order, because certainly we're not
4 going to have terminated these proceedings by next
5 Tuesday.

6 So we will still have jurisdiction. We
7 will be able to modify that protective order at that
8 point in time.

9 MS. BROCK: I guess what troubles me right
10 now is that the way you've stated this protective
11 order is the affidavits themselves will go to --

12 ADMIN. JUDGE McDADE: Ms. Garde.

13 MS. BROCK: Clifford and Garde and to Mr.
14 Siemaszko. Mr. Siemaszko is then allowed to reveal
15 the information in it to the criminal attorney. The
16 criminal attorney is not subject to this order and so
17 would therefore be able to disseminate it outside of
18 that proceeding and this Board and the Agency would
19 have no recourse.

20 ADMIN. JUDGE McDADE: That individual is
21 not before this Board. This Board doesn't have, in my
22 view, any jurisdiction over them to issue an order to
23 that individual. The individual is not going to
24 physically have the document to disseminate and how do
25 we then get into his mind? And again, part of it is,

1 quite frankly, in issuing the protective order the way
2 I have, I don't really know how the content of those
3 affidavits is going to be of help to anybody.

4 And specifically, I don't know how the
5 content of those affidavits could interfere with the
6 investigation or jeopardize the prosecution. And that
7 really is the issue. By giving those, by allowing Mr.
8 Siemaszko access to that and saying we are not going
9 to get involved in discussions between Mr. Siemaszko
10 and his attorney, I don't see how that, as I said, and
11 the standard interferes with the on-going
12 investigation or jeopardizes the prosecution. So
13 that's what I'm proposing to do.

14 MS. BROCK: I'm struggling a little bit
15 because these are not really our documents and when I
16 specifically discussed the protective order with the
17 Department of Justice and whether they were willing to
18 agree to Ms. Garde's proposed protective order, the
19 points of contention were as I outlined which
20 specifically was it should only be used for this
21 proceeding and that it needed a nondisclosure
22 agreement identifying who had it and who had the
23 access to it. And so --

24 ADMIN. JUDGE McDADE: But the access to it
25 as ordered now are the attorneys for Mr. Siemaszko in

1 this proceeding, the paralegal, who is working with
2 them in this proceeding and Mr. Siemaszko.

3 MS. BROCK: Right.

4 ADMIN. JUDGE McDADE: Those are the only
5 individuals we have granted access to the documents
6 period.

7 Now the problem that arises is the
8 information in the back of the head and I just don't
9 see how it is appropriate for us to get involved in
10 discussions between Mr. Siemaszko and the attorney who
11 is representing him in a criminal matter. It doesn't
12 strike me that that is either good policy or that we
13 have the authority to do so.

14 And let me just discuss something with my
15 colleagues. The only thing that I could think that
16 might satisfy your concerns and be a legitimate way of
17 going is to say for now, that we will furnish those
18 documents to counsel for Mr. Siemaszko, but not to Mr.
19 Siemaszko and to leave that through Tuesday of next
20 week, that they can review them now and unless the NRC
21 Staff submits something that we find compelling, to
22 otherwise restrict it. That will give you an
23 opportunity to discuss this with the Department of
24 Justice, to raise any concerns that you have and
25 present them to us.

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1 Before I do that, and discuss it with my
2 colleagues, let me get the position of counsel for Mr.
3 Siemaszko. Would it work for you to hold on to that
4 until Tuesday of next week and at that point have the
5 ability to share it with your client?

6 MS. GARDE: You mean just us read it and
7 not tell Mr. Siemaszko and then make a decision in the
8 absence of his knowing what's in them about whether we
9 have an objection? We can't do that.

10 ADMIN. JUDGE McDADE: Well, one of the
11 things that you proposed in your letter is you all
12 reading the document and not getting a physical copy
13 of it.

14 Would that satisfy your concerns that
15 today they make those documents available for you to
16 read, that absent something further from the Staff and
17 a subsequent order by the Board that as of Tuesday,
18 those documents would be physically furnished to you.

19 MS. GARDE: That's all right, as long as
20 I can talk to my client about what's in them.

21 ADMIN. JUDGE McDADE: Do you all have a
22 problem with that?

23 MS. BROCK: If we could break for 10
24 minutes, I could try to contact Justice and see if
25 they're okay with expanding it to the criminal

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1 attorney, while you confer with your colleagues?

2 ADMIN. JUDGE McDADE: Do you have a
3 problem? I know you all are here with another hearing
4 as well, another matter. When do you have to be back
5 to that?

6 MS. GARDE: Forty minutes ago. And
7 they're giving away the store while we're -- David and
8 I are holding down the public interest.

9 ADMIN. JUDGE McDADE: Why don't we take
10 five minutes, make your telephone call. You're either
11 going to be able to get through to them or you're not.

12 ADMIN. JUDGE HAWKENS: Can I mention one
13 thing? In light of the fact that the initial
14 affidavit, Mr. Ballantine, agreed to release it into
15 the public domain, I think that should forcefully be
16 brought to his attorney when discussing whether these
17 can be released to --

18 MS. BROCK: I'm reluctant to switch some
19 things since they belong to them.

20 ADMIN. JUDGE HAWKENS: And that's
21 legitimate, but make sure that he recalls how this all
22 started and how that initial affidavit was released
23 pursuant to his permission.

24 MS. BROCK: Okay.

25 ADMIN. JUDGE McDADE: And again, the

1 question is when you come back why would the release
2 of this interfere with the investigation or how would
3 it jeopardize the ongoing, a subsequent prosecution.

4 MS. BROCK: Released to the public or
5 released to Mr. Siemaszko's counsel?

6 ADMIN. JUDGE McDADE: Released pursuant to
7 what I proposed.

8 MS. BROCK: Okay. Thank you.

9 ADMIN. JUDGE McDADE: We'll take five
10 minutes.

11 (Off the record.)

12 ADMIN. JUDGE McDADE: Okay, the hearing
13 will once again come to order.

14 Ms. Brock, do you have anything further?

15 MS. BROCK: No, I wasn't able to reach
16 Justice, but I think, as I understand it, currently I
17 will provide the affidavits later this afternoon to
18 Ms. Garde. She can share the information in them with
19 Mr. Siemaszko. If we don't file anything by Tuesday,
20 she can give the document to Mr. Siemaszko and he will
21 be under the same restriction of not giving it out,
22 the documents or the information except for we're not
23 interfering with his communications with his criminal
24 counsel. Is that right?

25 ADMIN. JUDGE McDADE: Is that agreeable to

1 you?

2 MS. GARDE: Yes. When she said not give
3 out the information, as long as that caveat is there
4 that he can speak with his criminal counsel.

5 ADMIN. JUDGE McDADE: The current order
6 would be that as of today, you will be furnished a
7 copy of those affidavits of Mr. Ballantine, all of
8 them. That for the time being, you maintain
9 possession of those. They are not to be shared with
10 anybody else.

11 MS. GARDE: Yes sir.

12 ADMIN. JUDGE McDADE: You can discuss the
13 content of that with your client and your client is
14 not precluded from discussing the content of that
15 either.

16 MS. GARDE: Yes sir.

17 ADMIN. JUDGE McDADE: That absent a
18 further order from the Board, as of Tuesday next, you
19 will be able to furnish a physical copy of that to Mr.
20 Siemaszko, but Mr. Siemaszko will not be able to
21 furnish a physical copy of that to anybody else.

22 MS. GARDE: Yes sir.

23 ADMIN. JUDGE McDADE: The physical copies
24 will be restricted to he and to you and your staff,
25 the other attorneys in your office and your support

1 staff, paralegal, who are representing him in this
2 administrative proceeding.

3 Any question?

4 MS. BROCK: And he would be allowed to
5 furnish -- we will not interfere with communications
6 with his criminal counsel, but beyond that, he could
7 not furnish the information in the affidavit to anyone
8 else?

9 ADMIN. JUDGE McDADE: Correct. Okay --

10 MS. BROCK: And if want to object to that,
11 we'll file it by Tuesday.

12 ADMIN. JUDGE McDADE: Good.

13 MS. BROCK: Explain to Justice that we
14 want to know exactly why that would interfere.

15 ADMIN. JUDGE McDADE: Yes. Okay, anything
16 further from the Staff for today?

17 Ms. Garde?

18 MS. GARDE: No. It was nice to meet you
19 in person.

20 ADMIN. JUDGE McDADE: Thank you. Good
21 meeting you as well.

22 Mr. Lochbaum?

23 MR. LOCHBAUM: No thank you.

24 ADMIN. JUDGE McDADE: Thank you and one
25 way or the other we will be issuing an order before

1 Christmas that will discuss the three issues stating
2 that we have granted intervention status to Union of
3 Concerned Scientists and Ohio Citizen Action as a
4 single entity represented by Mr. Lochbaum; the status
5 of the proof, what it is the Government is going to
6 have to prove in order to sustain the order; and our
7 ruling on the Motion for Stay.

8 Is there anything else that we would need
9 to put into that order from the standpoint of the
10 Staff?

11 MS. BROCK: The only thing, in the event
12 you deny our Motion to Stay, how quickly do you
13 anticipate wanting us to produce our documents?

14 ADMIN. JUDGE McDADE: That's what I was
15 discussing earlier --

16 MS. BROCK: Okay, that's the same thing,
17 five days. I wasn't sure if that was just for the
18 appeal or that would also run to the documents.
19 That's fine.

20 ADMIN. JUDGE McDADE: The idea is that if
21 you appealed it and the appeal were granted and
22 everything was already turned over, it would make the
23 appeal somewhat moot. So that's why I was asking how
24 much time you would be looking for.

25 MS. BROCK: Okay, thank you.

1 ADMIN. JUDGE McDADE: Thank you. We're
2 now in recess.

3 (Whereupon, at 2:27 p.m., the pre-hearing
4 conference was concluded.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Pre-Hearing Conference
ITMO of Andrew Siemaszko
Docket Number: IA-05-021
ASLBP No.: 05-839-02-EA
Location: Rockville, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Lindsay Barnes
Official Reporter
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