

RAS 10873

**Official Transcript of Proceedings**  
**NUCLEAR REGULATORY COMMISSION**

Title: Prehearing Conference  
ITMO of Andrew Siemaszko

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

Location: Rockville, Maryland

Date: Thursday, December 15, 2005

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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
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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:

2 On Behalf of the Nuclear Regulatory Commission:

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1           On   Behalf   of   the   Union   of   Concerned  
2   Scientists/Ohio Citizen Action:

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

2 12:29 P.M.

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

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

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

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

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

17 ADMIN. JUDGE McDADE: And Mr. Lochbaum?

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

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

25 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,

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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

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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 disclose 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

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.

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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

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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

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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  
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